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No. 91-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COLLEEN HAYES, NATHANIEL CALDWELL and TOM ALLISON,

Petitioners,

v.

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eleventh Circuit failed to apply the correct standard in determining whether the defense of qualified immunity was properly denied to public officials in connection with an alleged denial of procedural due process.

2. Whether a public official's defense of qualified immunity should be submitted to a jury when it cannot be resolved beforehand by a motion for summary judgment because of disputed material facts.

PARTIES BELOW

Petitioners Colleen Hayes and Nathaniel Caldwell were defendants in the District Court and appellees/cross-appellants in the Court of Appeals. Petitioner Tom Allison was a defendant in the District Court. Respondents Gregg Fitzgerald Bailey and Lizzie Shirley Bailey were plaintiffs in the District Court and appellants/cross-appellees in the Court of Appeals.

The other defendants in the District Court were: Board of County Commissioners of Alachua County, Florida; Eugene T. Whitworth, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities; L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities; City of Gainesville, Florida; John Stanton Tileston, Sr.; James Strauss; Farnell Cole; Gary Brown; Charles Jerkins; Spencer Mann; and Stephen Garrahan.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Colleen Hayes, Nathaniel Caldwell and Tom Allison respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 956 F.2d 1112 (11th Cir. 1992), and is reproduced in Appendix A (App. 1a-35a). The final judgments and orders of the United States District Court for the Northern District of Florida (App. 36a-51a) are unreported.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343, Respondents Gregg Fitzgerald Bailey ("Bailey") and his wife, Lizzie Shirley Bailey, brought this suit in the District Court for the Northern District of Florida. On June 2, 1990, the District Court denied Petitioners' motion for summary judgment for qualified immunity with respect to certain procedural due process claims made by Bailey and granted summary judgment as to other defendants. On July 9, 1990, the District Court orally dismissed all claims against Petitioner Tom Allison ("Allison") on the ground of qualified immunity. The case was then tried to a jury which issued its verdict against Petitioners Nathaniel Caldwell ("Caldwell") and Colleen Hayes ("Hayes") on August 6, 1990. App. 52a-53a. Bailey appealed and Caldwell and Hayes cross-appealed to the Court of Appeals of the Eleventh Circuit.

The decision of the Court of Appeals was entered on March 31, 1992 reversing the District Court's granting of qualified immunity to Allison and affirming the District Court's denial of qualified immunity to Caldwell and Hayes with respect to certain alleged procedural due process violations. The Court of Appeals remanded the case for a new trial of Allison, Caldwell and Hayes on Bailey's post-deprivation procedural due process claims.[1]

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[1] Even though this case has been remanded for a new trial, the issues presented here are ripe for review at this time. The issues raised regarding the application of the qualified immunity doctrine, generally required to be resolved before trial, are fundamental to the further conduct of this case. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). If the Court accepts certiorari, the resulting decision could substantially alter the conduct of the trial on remand. Moreover, since the denial of a qualified immunity claim on a motion for summary judgment is a final order for purposes of appellate review (*Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)), it follows that the qualified immunity issues raised in this petition should be examined despite the Eleventh Circuit's remand to the

The Court of Appeals denied Bailey's suggestion for rehearing en banc on June 1, 1992. On June 4, 1992, Caldwell and Hayes filed with the Court of Appeals their motion for stay of mandate pending consideration of this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Civil Action for Deprivation of Rights, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

As the result of a state investigation into escape attempts from a county jail, Bailey, a former corrections officer with the Alachua County Department of Corrections, was arrested and suspended from his job. After criminal charges were dismissed and a state law enforcement agency investigation ended, Bailey was reinstated to his job with back pay. Upon the advice of his psychiatrist, Bailey did not return to work. Bailey then instituted this action pursuant to 42 U.S.C. § 1983 and state law against twelve defendants, including two governmental entities and twelve individuals (Hayes, Caldwell and Allison were three of the defendants), alleging that he had been deprived of certain constitutional rights.

Relevant to this petition are Bailey's allegations that Allison, Caldwell and Hayes had deprived him of em-

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District Court. *See* Stern, Gressman, Shapiro, *Supreme Court Practice*, § 4.18 (6th Ed. 1986).

ployment procedural due process at both the time of his arrest and suspension in May 1987 ("pre-deprivation") and during the period from his suspension to his reinstatement in June 1988 upon termination of a State of Florida law enforcement agency investigation ("post-deprivation"). During that period, Caldwell was the County Director of Public Safety and Hayes was the County Personnel Director. Allison was Assistant and then Acting Director of Corrections (as of July 1987) until February 1988 when he left the County's employ.

Before the opening of the trial, by order dated July 2, 1990, the District Court granted Allison, Caldwell and Hayes qualified immunity as to Bailey's procedural due process claims with respect to his arrest and suspension. App. 57a-80a. In that same order, the District Court indicated that more information was required before it could rule on the issue of post-deprivation procedural due process. Petitioners took immediate appeals pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Eleventh Circuit did not accept jurisdiction over those appeals. App. 54a-56a. As indicated by Chief Judge Tjoflat's special concurrence, the ground for denial was based on then-existing circuit precedent that the Court of Appeals lacked jurisdiction over the denial of summary judgment based on qualified immunity on certain claims if the defendants would have to go to trial on other claims.[2] Therefore, upon that interlocutory appeal, the Eleventh Circuit did not decide the merits of Petitioners' motion for summary judgment based on their defense of qualified immunity.

The case proceeded to trial. On the first day of the trial, the District Court granted Allison qualified im-

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[2] Since that decision, the Eleventh Circuit issued its en banc opinion on rehearing in *Green v. Brantley*, 941 F.2d 1146 (11th Cir. 1991), holding that the Court now has jurisdiction to hear an interlocutory appeal on the issue of qualified immunity even when the defendant will face trial on another claim arising from the same occurrence.

munity as to the remaining claims against him. At the end of Bailey's case, Caldwell and Hayes moved for a directed verdict, which was denied. At that time, the District Court explicitly refused to rule on their defense of qualified immunity. At the close of the defendants' case, the District Court directed a verdict that Bailey's arrest was legal because probable cause existed. The only remaining claims, the post-deprivation procedural due process claims, were submitted to the jury against the three remaining of the original twelve defendants—Alachua County, Caldwell and Hayes. Prior to submitting the case to the jury, the District Court again reserved the qualified immunity issue and although Caldwell and Hayes requested that the Court instruct the jury on qualified immunity, the Court refused to do so. App. 81a-82a.

On August 6, 1990, the jury reached its verdict, finding in favor of Alachua County and against Caldwell and Hayes with respect to the post-deprivation procedural due process claims in an amount in excess of two million dollars. App. 52a-53a. Thereafter, the District Court denied all parties' motions for new trial and for judgment notwithstanding the verdict. App. 36a-37a, 50a. An appeal to the Eleventh Circuit followed.

On appeal, the Eleventh Circuit upheld the District Court's decision to grant Allison, Caldwell and Hayes qualified immunity as to Bailey's pre-deprivation due process claims. *See* App. 20a-21a. With respect to one of Bailey's post-deprivation due process claims (his alleged right to a name-clearing hearing for alleged stigmatizing information in his personnel file) the Eleventh Circuit reversed the District Court's decision and ruled that Caldwell and Hayes were entitled to qualified immunity as a matter of law. *See* App. 24a-26a. However, with respect to Bailey's other post-deprivation due process claim (his alleged right to a hearing regarding his suspension during the period between his arrest (May 1987) and the dismissal of the criminal charges (November

1987) and then from the dismissal of criminal charges until his reinstatement in June 1988) the Eleventh Circuit treated the District Court's refusal to rule on Petitioners' qualified immunity defense as a rejection of that defense. *See* App. 26a. The Eleventh Circuit decided that Caldwell and Hayes were not entitled to qualified immunity and proceeded immediately to analyze the liability issue, presented as whether Caldwell and Hayes denied Bailey due process. *See* App. 27a. The Eleventh Circuit also reversed the District Court's granting of qualified immunity to Allison on his motion for summary judgment prior to trial. *See* App. 21a. The Eleventh Circuit therefore reversed the jury verdict against Caldwell and Hayes and remanded the case for a new trial of Allison, Caldwell and Hayes on Bailey's post-deprivation procedural due process claims.

Without describing the full analytical framework for determining the issue of qualified immunity, as enunciated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Eleventh Circuit held that Caldwell and Hayes simply were not entitled to qualified immunity. The Court's discussion of the threshold question in considering qualified immunity—whether the law was clearly established at the time the public officials acted or failed to act—was limited to one sentence. With no discussion of the law of post-deprivation procedural due process "in a more particularized, and hence more relevant sense" (*Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), the Eleventh Circuit merely stated that "Bailey has shown that the law was clearly established that he was due some 'meaningful' process within a 'meaningful' time." *See* App. 27a.

The Eleventh Circuit also interpreted the District Court's failure to rule on Caldwell's and Hayes' qualified immunity defense at any point before, during or after the trial as a denial of qualified immunity. In a footnote, the Eleventh Circuit noted that the District Court did not

err in refusing to submit the issue to the jury: "This argument is contrary to the law in this circuit. *See Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991). . . . We recognize, as did the panel in *Ansley*, that there is a split of authority in the circuits as to whether qualified immunity from damages may be asserted at trial and is properly included in jury instructions." App. 26a, n.17 (citations omitted)

After finding that Allison, Caldwell and Hayes, were not entitled to qualified immunity, the Eleventh Circuit then determined that Bailey had shown a conflict in the evidence regarding "whether Bailey received less process than he was due as a matter of law." App. 27a. The Eleventh Circuit then found that significant prejudicial errors had been committed by the District Court during the trial. The District Court had erroneously denied the request of Caldwell and Hayes to sever the employment-related due process issues from the false arrest, false imprisonment and conspiracy issues. *See* App. 29a. The District Court also erroneously permitted a biased juror to sit on the jury and had failed to instruct the jury properly on the specification of damages the jury could consider. *See* App. 29a-34a. These errors led to the Eleventh Circuit's reversal of the jury verdict against Caldwell and Hayes and the remand for a new trial of Allison, Caldwell and Hayes on Bailey's post-deprivation procedural due process claims.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT IGNORED ESTABLISHED SUPREME COURT PRECEDENT BY FAILING TO APPLY THE CORRECT STANDARD FOR DETERMINING WHETHER PETITIONERS SHOULD BE GRANTED QUALIFIED IMMUNITY.

The Eleventh Circuit refused to decide the threshold legal question required by the Supreme Court to be decided in every qualified immunity case: was the law "clearly established"? Instead, the Eleventh Circuit in

this case relegated that legal question to the jury. Precisely the issue that the court itself must decide in this case—what process was meaningful and when it was due—was dodged by the Eleventh Circuit and erroneously sent back to the jury. Because the Eleventh Circuit failed to apply the Supreme Court's standard for determining whether public officials should be protected from liability by qualified immunity, this Court should exercise its power of supervision and correct this error of law.

In this case, the Eleventh Circuit denied qualified immunity to Petitioners without properly resolving the threshold question in this Court's qualified immunity analysis: was the law the officials were alleged to have violated "clearly established"? The issue of qualified immunity was raised by Petitioners Caldwell and Hayes many times in the District Court, which repeatedly postponed a determination without discussion, only to be overlooked by the Eleventh Circuit.

If this Court does not provide an analysis of the clearly established law in the context of this case, Caldwell and Hayes will be forced to stand trial for a *second* time without an adequate finding on their claim of qualified immunity. Such repeated exposure to trials undercuts the policy intended to be served by the qualified immunity doctrine—to avoid subjecting government officials to the distraction and inhibiting effects of trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

The framework for determining whether a public official may defend herself by asserting this qualified immunity requires a two-prong inquiry. Under the first prong, the public official is immune from liability if she did not violate "clearly established law." *Harlow*, 457 U.S. at 818. The law must be clearly established at the time that the actions complained of occurred. If the trial court finds that the law was not clearly established (if there is any confusion about the state of the law at the time), the public official is qualifiedly immune. If, and

only if, the court finds that the plaintiff's clearly established rights were violated would the court then address the second prong of the inquiry: the official would still be qualifiedly immune if the official "neither knew nor should have known of the relevant legal standard." *Id.* at 819. In other words, the "objective legal reasonableness" of the official's action is assessed in light of the legal rules that were "clearly established" at the time it was taken. *Id.*

The period of claimed due process deprivation in this case begins with Bailey's lawful arrest and imprisonment on May 14, 1987 and ends with the notice of reinstatement and back pay of June 20, 1988. Of record and not disputable at this point is that he was lawfully charged with a felony and that those charges were withdrawn on November 19, 1987. He then, for the first time, requested reinstatement or a hearing, but received neither until the following June—a period of seven months from the date criminal charges were dismissed and twelve months from the date of the arrest. Petitioners claim that the law was not so clearly established then, or indeed now, that Bailey's constitutional rights to due process required them to give him a hearing during that seven or twelve month period, or be liable personally for not doing so.

The reason for the delay in reinstatement was, first, that criminal charges were pending, and then, that the Florida Department of Law Enforcement was reviewing the state attorney's file to determine whether Bailey's certificate to be a correctional officer would be revoked—without which he could not retain his job with the County. The reason for not providing him with a hearing during the initial five-month period was the pendency of the criminal trial and thereafter because Acting Corrections Director Allison felt that he could not make an effective decision concerning Bailey until the state agency concluded its investigation.

The Eleventh Circuit identified the clearly established law in this case to be that Bailey "was due some 'meaningful' process within a 'meaningful' time." *See* App.

27a. This proposition is unassailable, but is virtually "meaningless" to the qualified immunity inquiry. It is precisely because such global statements of clearly established law do not lead to proper application of the qualified immunity doctrine that this court held in *Anderson v. Creighton*, 483 U.S. 635 (1987), that the right alleged to have been violated must have been "clearly established" in a "more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640. *Anderson* requires that the law under consideration must have provided a standard clear and specific enough *under the circumstances* for a reasonable official to have known whether actions taken or decisions made were unlawful. The specificity of the standard is essential to reaching a correct conclusion on the state of the law.

The Eleventh Circuit, in fact, explicitly eschewed any responsibility to set forth the particularized due process requirements in this case. In a feat of contradictory reasoning, the Eleventh Circuit acknowledged that confusion beset any analysis of the timing of the process that might have been due Bailey, yet still found the law to be "clearly established." The Eleventh Circuit noted that "[c]onfusion has reigned" concerning whether the period of post-suspension deprivation began in May or November 1987, but then later stated that: "Fortunately, we need not affix dates to Bailey's procedural due process claims to resolve this confused issue." App. 18a. By virtue of this confusion alone, first the District Court and then the Eleventh Circuit should have held that the law was *not* clearly established in this factual context.

If a federal district court judge and three appellate judges believed that the commencement of the period of deprivation was confusing and were not able to resolve it, how can the defendants have been charged with knowledge of clear law under these circumstances? The Elev-

enth Circuit simply applied global law concerning due process in a generalized sense without regard for the facts of this case and the particularized standard required by this Court in determining whether the law was clearly established. After congratulating itself for not having "to resolve this confused issue" (App. 18a) of when Bailey's entitlement to due process begins, the Eleventh Circuit identified a number of factual issues which it stated "prohibited us from deciding whether Bailey received less process than he was due as a matter of law." App. 27a.[3] The Eleventh Circuit, therefore, ducked its responsibility to decide the legal question of whether the clearly established law required that Bailey have a hearing and has directed that issue to go to a jury. By thus jumping, or stumbling, over the threshold question of the qualified immunity inquiry, the decision of the Eleventh Circuit emphasizes the difficulty in deciding what kind of process, if any, and when it should have been afforded Bailey under the complicated circumstances confronting Petitioners during the period between Bailey's arrest and his reinstatement.

The application of a generalized procedural due process standard by the Eleventh Circuit in its one-line determination of the issue did not discharge the Court's duty. This is exactly the error which this Court flagged and warned against in *Anderson*. If courts consider only globally-expressed legal principles, such as "the right to due process is clearly established by the Due Process Clause,"

> *Harlow* would be transformed from a guarantee of immunity to a rule of pleading. Such an approach, in sum, would destroy 'the balance that our cases

[3] The Court then discussed a "fact-bound notice issue" (App. 27a) and a perceived inconsistency in the position that a hearing would have been futile and therefore was not provided versus the position that Bailey received all the process to which he was entitled under the personnel regulations. *See* App. 27a-28a.

> strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties' by making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'

Anderson, 483 U.S. at 639. (citations omitted)

The Eleventh Circuit has failed to adequately consider the threshold question in this case—whether the law of procedural due process was clearly established in the more "particularized sense" required by *Anderson* in 1987 and 1988. Petitioners request that this Court exercise its supervisory power to clarify the interpretation of the qualified immunity analytical structure and provide these public officials with the qualified immunity that they have requested many times, but which has never been properly addressed by any court. Without this Court's consideration, Caldwell and Hayes will be required to stand trial for a *second* time on the issue of liability when the threshold question of their entitlement to qualified immunity has never adequately been addressed.

II. THE ELEVENTH CIRCUIT'S ENDORSEMENT OF THE VIEW THAT QUALIFIED IMMUNITY MAY NOT BE ASSERTED AT TRIAL AND MAY NOT BE SUBMITTED TO A JURY IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUITS ON THE IDENTICAL ISSUE AND IS ATTRIBUTED TO A MISAPPLICATION OF SUPREME COURT PRECEDENT.

If the Eleventh Circuit decision is allowed to stand and these public officials are tried again for allegedly denying Bailey meaningful process at a meaningful time, it is then important to resolve the issue of what the jury may be instructed about the qualified immunity defense. Therefore, this case raises an important question often confronted by district court judges when the defense of qualified immunity is asserted by public officials. As

happened in this case, a trial judge may deny an official's motion for summary judgment on the ground that issues of material fact prevent the court from deciding the question of qualified immunity as a matter of law. At that point, the judge must decide whether to permit the qualified immunity defense to survive and be asserted at trial. At the conclusion of the trial, the judge must then decide whether to instruct the jury on the issue of qualified immunity. The Circuits are split in the guidance they provide district courts in this matter of the survival of qualified immunity as a defense at trial and, ultimately, as a jury question.

When a public official asserts a qualified immunity defense, the trial court must apply the analysis provided by this Court in *Harlow v. Fitzgerald* and *Anderson v. Creighton*. The court must first determine the threshold question of whether the law governing the official's conduct was clearly established. If the court determines that the law was not clearly established, the public official is qualifiedly immune as a matter of law. If, however, the court determines that the law was clearly established at the time in question, the inquiry does not end. The court then confronts the second prong of the qualified immunity inquiry: whether a reasonable public official, in light of the clearly established law and the information possessed by that official, could have believed that the action taken was unlawful. *Anderson*, 483 U.S. at 641.[4]

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[4] There is an argument that if there exist factual issues upon which entitlement to qualified immunity turns and which must be submitted to a jury, then qualified immunity must be granted as a matter of law. This is so because jury questions exist only if reasonable people can disagree about the facts. If a jury is free to decide the facts either way, then the defendant cannot have been "plainly incompetent" or have "knowingly violated the law," to paraphrase this Court's statement in *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986). To paraphrase further, this time from baseball, ties go to the defendant. As applied to this case, it is an argument that, if a jury question exists as to whether or not Petitioners denied Bailey meaningful due process at a meaningful time, Petitioners are en-

This Court has stated both in *Mitchell v. Forsyth*, and more recently in *Hunter v. Bryant*, 112 S.Ct. 534 (1991), that the policy considerations supporting the doctrine of qualified immunity militate in favor of the earliest possible resolution of the issue—preferably on a motion for summary judgment. In fact, *Mitchell* provides an interlocutory appeal mechanism for public officials who believe that an early denial of qualified immunity was erroneous. This Court's *per curiam* opinion in *Hunter* requires that if at all possible, the court should decide the issue of qualified immunity as a matter of law "long before trial." *Hunter*, 112 S.Ct. at 537.

However, if the trial court determines (after its threshold finding that the law was clearly established) that a factual dispute exists which precludes summary judgment, the Circuit Courts of Appeals are in disagreement over the next step to be taken by the trial court. As the Eleventh Circuit pointed out in this case, "there is a split of authority in the circuits as to whether qualified immunity from damages may be asserted at trial and is properly included in jury instructions." App. 26a, n.17. Because of this split of authority, the Eleventh Circuit felt compelled to follow the precedential case in the Eleventh Circuit, *Ansley* v. *Heinrich*, 925 F.2d 1339 (11th Cir. 1991) and upheld the District Court's refusal to instruct the jury as to the qualified immunity defense asserted by Caldwell and Hayes. *Ansley* was an excessive use-of-force case in which police officers were found negligent, but were exonerated from a Section 1983 claim brought by a security guard who was shot by the officers. The Eleventh Circuit reviewed the opinions of other Circuits, recognized the split among the Circuits, and concluded that the trial court should not have instructed the jury on the issue of qualified immunity. 925 F.2d at 1347.

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titled to qualified immunity as a matter of law, because reasonable jurors (and therefore reasonable officials in Petitioners' positions) could believe that Bailey was not so denied.

Although the determination of qualified immunity should not routinely be placed in the hands of the jury, and as we have urged in this Petition it should be resolved in this case as a matter of law on behalf of Petitioners, there are circumstances in which fact-finding by a jury is the most appropriate method of determination. Moreover, it would be anomalous to have a court deny summary judgment because of disputed factual issues and then refuse to submit the question to a jury when there is sufficient evidence in the record for the jury to decide the question. This case is illustrative of just such a category of cases in which the qualified immunity issue may not be resolved before trial and should therefore be submitted to a jury.

In this case, the District Court instructed the jury only on the issue of Caldwell's and Hayes' potential liability for the alleged denial of process due Bailey after his arrest and suspension. The Court was asked, but refused, to instruct the jury on the settled legal principle underlying the second prong of the qualified immunity inquiry—even if there had been a violation of Bailey's constitutional rights, Caldwell and Hayes could still have been shielded from liability by qualified immunity. In other words, if there could have been a finding that these public officials, in the light of the information they possessed at the time, could reasonably have believed that their failure to provide Bailey with a hearing was not unlawful, then the officials would have been immune from liability.

In fact, this Court in *Anderson* held that a violation of a constitutional right may have occurred, but the public official involved may still be entitled to qualified immunity. This fundamental principle of the qualified immunity doctrine was reiterated in *Hunter*, a case in which the Court reversed the Ninth Circuit and granted qualified immunity to secret service agents for the arrest of a suspect for threatening the President of the United States:

> Even if we assumed *arguendo*, that they [the Secret Service agents] (*and* the magistrate) erred in concluding that probable cause existed to arrest Bryant, the agents nevertheless would be entitled to qualified immunity because their decision was reasonable even if mistaken. The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'

Id. at 537 (citing *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986). (emphasis in original)

The Eleventh Circuit's view of this matter, as expressed in *Ansley*, is based on a misapplication of this Court's decision in *Mitchell v. Forsyth*.[5] *Mitchell* expands on this Court's redefinition of qualified immunity in *Harlow* by permitting public officials to appeal a denial of qualified immunity based on a finding that the law allegedly violated was clearly established. *Mitchell*, 472 U.S. at 528. However, *Mitchell* does not address the question raised here: if the trial court finds that issues of disputed fact must be resolved, does the qualified immunity defense survive a denial of summary judgment?

In a misinterpretation of *Mitchell*, the Eleventh Circuit in *Ansley* stated that "[q]ualified immunity is an affirmative defense from trial and not a defense to liability

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[5] Other circuits have also adopted the Eleventh Circuit's view that the qualified immunity defense is not available to public official defendants at trial and may not be submitted to a jury for resolution. *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), *cert. denied*, 488 U.S. 823 (1988) (prison officials not entitled to qualified immunity in Section 1983 action brought as the result of death of psychiatrically disturbed prisoner); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985), *cert. dismissed*, 478 U.S. 1044 (1986) (case involving probable cause for home search and seizure remanded for new trial in part because court erred in instructing jury on qualified immunity); *Coffman v. Trickey*, 884 F.2d 1057 (8th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) (prison official denied qualified immunity for depriving prisoners of due process in connection with discipline).

issues raised during trial. *See Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815. Accordingly, once the defense of qualified immunity is denied pretrial due to disputed issues of material facts, the jury should determine the factual issues without any mention of qualified immunity." *Ansley*, 925 F.2d at 1348.

By contrast, the Sixth Circuit in *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), in an explication of the *Mitchell* decision, stated that "*Mitchell* makes it clear that the immunity doctrine's protections against liability and against the various burdens of litigating insubstantial claims are conceptually distinct. *Mitchell*, 105 S. Ct. at 2816. Consequently, decisions with respect to dismissal or summary judgment, if adverse, do not preclude the interposition of the defense of immunity as a defense to liability on the merits." *Kennedy*, 797 F.2d at 300.

The Second, Fifth, Ninth and Tenth Circuits are in agreement with this second view that as the trier of fact, the jury can properly determine the reasonableness of a public official's actions after being instructed according to the *Harlow/Anderson* standard. *See Warren v. Dwyer*, 906 F.2d 71, 74 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 431 (1990) (affirmance of district court's decision to submit qualified immunity question to the jury and upholding jury instructions, because "[p]re-trial resolution of the defense . . . may be thwarted by a factual dispute. . . ."); *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989) (affirmance of district court's decision to submit qualified immunity question to jury in illegal search case); *Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988) (reasonableness of police officer's action in context of qualified immunity defense was fact-specific and appropriate to be submitted to jury in warrantless arrest case).

The *Ansley* decision and the decisions of the other Circuits that have taken the same position as the Eleventh Circuit misread *Mitchell* and are in direct contradiction

to this Court's view as expressed in *Harlow*. Qualified immunity is not only immunity from trial, but first and foremost, immunity from liability. *Harlow*, 457 U.S. at 818. By taking the contrary position, the Eleventh Circuit is attempting to narrow the qualified immunity doctrine. The result is an expansion of the potential liability of public officials. The danger of this expansion of liability is most obvious in cases such as this where the facts necessary to determine the reasonableness of the action or inaction of the officials are clearly distinct from the facts required to determine liability for procedural due process violations. For example, factual questions which must be answered in connection with the second prong of the qualified immunity inquiry include such matters as what information the public officials possessed at the time the challenged action was taken, as well as the responsibilities of the officials and their connection with the violations claimed. Often, this is a credibility contest that must await resolution at trial.

If material facts remain in dispute regarding qualified immunity, the jury should be instructed that its resolution of those factual disputes will result in qualified immunity. It should be made clear to the jury that the facts pertinent to a determination of the reasonableness of the public officials' actions are different from the facts it will find regarding violation *vel non* of the plaintiff's constitutional rights. If the jury in this case is to resolve factual issues of notice to Bailey, as well as factual issues regarding Petitioners' knowledge and motivation, then the jurors should also be told that they are to consider whether Petitioners reasonably believed that Bailey's status (1) pending a criminal trial, and (2) pending the state agency investigation, obviated any need and purpose for an employment suspension hearing until the criminal proceedings and the state agency investigation had concluded. The jury should also be told that the answers to those questions determine whether defendants have

qualified immunity for denying Bailey a hearing, although perhaps mistakenly so.

Both the Fifth and Second Circuits have suggested the use of special interrogatories to ensure that the jury separates its qualified immunity fact-finding from its liability fact-finding. *Melear v. Spears*, 862 F.2d at 1187-88; *Warren v. Dwyer*, 906 F.2d at 75. In this case, the Eleventh Circuit has held that it is the jury's duty to sort out what manner of process Bailey should have received and when he should have received it. However, if factual disputes must be resolved to determine whether Allison, Caldwell and Hayes are qualifiedly immune, the jury should be charged with finding the facts necessary to determine whether they acted in good faith.

The Eleventh Circuit has chosen to interpret *Mitchell*, a case designed to provide an early opportunity to appeal a denial of qualified immunity on legal grounds, as narrowing rather than expanding the protection qualified immunity is meant to provide. The *Ansley* decision seeks to transform the decision in *Mitchell* into a limitation on that protection. To cut off the officials' right to have the jury perform its traditional and required function is directly apposite to the purpose of the doctrine. A defendant should not lose this important protection merely because a plaintiff is able to point to evidence that creates a genuine issue of material fact sufficient to defeat the defendant's summary judgment motion. A public official's protection from liability should not end there. This Court should take this opportunity to clear up the confusion spawned by the divided Circuit Court interpretations of *Mitchell*.

In addition, this Court should act now to prevent the continued narrowing of this important doctrine. The confusion wrought by the aftermath of *Mitchell* should be resolved. This case provides the ideal vehicle for such resolution because it places the split of Circuit authority squarely before the Court. The protection afforded

by qualified immunity, which is essential to the proper functioning of government, should not be narrowed to only immunity from trial. More fundamental even is the immunity from liability. In this imperfect world where public officials are charged with making difficult policy decisions and must at the same time protect the rights of individuals, those officials must make their decisions with the information they possess without fear of constant exposure to potentially enormous liability. Given the division of views in the Circuits, this Court should wait no longer to resolve this question.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 26, 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-3275

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs-Appellants-Cross-Appellees,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, EUGENE T. WHITWORTH, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities, L.J. "LU" HINDERY, Sheriff of Alachua County, Florida, in his individual and official capacities, CITY OF GAINESVILLE, FLORIDA, JOHN STANTON TILESTON, SR., JAMES STRAUSS, FARNELL COLE, GARY BROWN, CHARLES JERKINS, TOM L. ALLISON, SPENCER MANN, STEPHEN GARRAHAN,
Defendants-Appellees,

NATHANIEL CALDWELL, COLLEEN HAYES,
Defendants-Appellees, Cross-Appellants.

March 31, 1992

Peter J. Hurtgen, Morgan, Lewis & Bockius, Miami, Fla., for Caldwell.

Thomas A. Bustin, Alachua Co. Atty's Office, Gainesville, Fla., for Hayes.

Robert C. Widman; Nelson, Hesse & Cyril, Sarasota, Fla., Joseph W. Little, Gainesville, Fla., for Bailey.

Ronald A. Labasky; Parker, Skelding, Labasky & Corry, Jennifer Parker Lavia, Tallahassee, Fla., for Cole.

Louis F. Hubener, III, Atty. Gen., Dept. of Legal Affairs, Tallahassee, Fla., for Tileston.

H. Jack Klingensmith; Jorden, Schulte & Burchette, Miami, Fla., for City of Gainesville.

Thomas H. Duffy, Tallahassee, Fla., for Allison.

Appeals from the United States District Court for the Northern District of Florida.

Before ANDERSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge:

Near the end of his graveyard work shift on May 14, 1987, Gregg Fitzgerald Bailey was arrested as the result of an undercover investigation at the Alachua County Detention Center (ACDC). Bailey had been a corrections officer (a prison guard) at ACDC since 1985. Based on his arrest and subsequent events, which included Bailey's suspension without pay from ACDC, Bailey and his wife (Lizzie Shirley Bailey) began this § 1983 action against two governmental entities (Alachua County and the City of Gainesville) and twelve individuals (Stephen Garrahan, James Strauss, Gary Brown, Tom L. Allison, John S. Tileston, Nate Caldwell, Colleen Hayes, Farnell Cole, Charles Jerkins, Spencer Mann, Eugene Whitworth and L.J. "Lu" Hindery) (collectively, "the defendants"). Most of the defendants exited this litigation either through summary judgments or dismissal motions prior to trial or through directed verdicts at the close of testimony, leaving only three defendants (Caldwell, Hayes and Alachua County) to go to the jury on Bailey's then-

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

remaining claims. The jury returned a verdict in favor of Bailey against Caldwell and Hayes, awarding Bailey damages of $2,182,406. The jury exonerated Alachua County from liability. Bailey now appeals many of the summary judgments and directed verdicts as well as the jury's verdict for Alachua County; Caldwell and Hayes cross-appeal the jury verdict against them. As discussed below, we affirm in part, reverse in part, and remand for a new trial against Caldwell, Hayes and Allison solely on Bailey's procedural due process claims stemming from his suspension.

I. FACTS

A. Background

On April 22, 1987, several inmates attempted to escape from ACDC by sawing a window with hacksaw blades. Lieutenant Brown, with the assistance of another ACDC officer, investigated the attempted escape and discovered that an inmate-trustee (Tribuani) had obtained the blades from a tool box in a maintenance room to which he had been allowed access. Tribuani had concealed the blades in his pants until he was able to pass the blades to other inmates, one of which was Charles Jerkins. Subsequently, Jerkins twice informed Brown that persons who were not inmates had assisted in the escape attempt. After consultation with Allison, who was then Assistant Director of ACDC, Brown contacted the State Attorney's Office to investigate the potential wrongdoing by ACDC employees.

As a result of Brown's contact, Tileston, who was serving as a Special Prosecutions Investigator with the State Attorney's Office, was assigned to investigate Jerkins' allegations. Tileston spoke with Brown, who told him that Jenkins' had said that a "professional person" had assisted in the April escape attempt.[1] Tileston was fa-

[1] Although Brown had completed a full report regarding his own investigation into the escape attempt, he did not give Tileston this written investigative report.

miliar with Jerkins because Jerkins was well known as both a criminal and a "snitch" to local law enforcement authorities. Tileston testified that Jerkins was a "known credible police source" and that he had verified through city and county law enforcement officers that Jerkins had provided reliable information in the past. Tr. 38-575-12, 13; Tr. 27-561-129, 130.

On May 8, 1987, Tileston interviewed Jerkins and Jerkins named Bailey as a participant in bringing hacksaw blades into the jail. Jerkins described letters he had written to his girlfriend in which he had urged her to contact Bailey to arrange to bring hacksaw blades into the jail. Jerkins said that he and Bailey had developed a prior personal relationship. Jerkins knew Bailey's phone number and told Tileston that he had offered Bailey both $500 and $1000 for hacksaw blades.

Tileston decided that he needed to test whether Bailey would accept money from Jerkins, and devised an undercover plan for this purpose. Because his office did not have the necessary equipment for his plan, Tileston obtained $500 cash and a body bug from the combined Gainesville/Alachua County Narcotics and Organized Crime Unit (NOCU). Furthermore, NOCU's Deputy Cole was assigned to provide Tileston technical assistance with the listening equipment. Tileston's plan was to give Jerkins the $500 with instructions to offer it to Bailey. A body bug would be placed on Jerkins so that any conversations between Bailey and Jerkins could be heard and recorded. Cole's responsibility was to monitor the listening equipment.

B. Bailey's Arrest

Tileston elected to conduct his test during Bailey's May 14 work shift. Brown, who was serving as Tileston's liaison with ACDC, arranged to wire Jerkins and to give him the $500 before Bailey came on duty. One of Brown's Lieutenants (Strauss) actually placed the body

bug on Jerkins and gave him the $500. Jerkins was instructed to tell Bailey he had the money and to try to get into a conversation with Bailey about hacksaw blades. Although Bailey had access to Jerkins throughout his shift because he was responsible for the jail area in which Jerkins was housed, a further opportunity for conversation between the two men was contrived when Tileston had one of Bailey's superiors instruct Bailey to remove Jerkins from his cell (ostensibly for more fingerprinting and charges) and then put him back.

Reception from the body bug was poor; Cole reported hearing a few snippets of conversation through his listening device, but a tape recording made of this conversation was later found to be inaudible. Specifically, at 12:08 a.m. Cole reported hearing Jerkins mention the "$500." Tileston, Brown and Cole, who were stationed in Allison's office, continued their monitoring throughout the night. At 6:21 a.m., Cole reported that he heard mention of "hacksaw blades" transmitted through Jerkins' body bug. At this time, Tileston wanted to know if the money had passed from Jerkins to Bailey. Brown ascertained through Sullivan that the money had passed to Bailey and relayed this information to Tileston. After a brief discussion, and wanting to capture the money before Bailey's shift ended at 7:00 a.m., Tileston and crew headed for the part of the jail where Bailey was stationed.

After locating Bailey, who was supervising the morning feeding of the prisoners, Tileston and Cole showed Bailey their badges and were introduced by Brown. Tileston then asked Bailey to accompany them to Allison's office to answer questions. No conversation transpired between Bailey and these officers during the five to ten minute walk to Allison's office. In Allison's office, Tileston informed Bailey that he was under arrest and Cole read Bailey his *Miranda* rights. After being asked about the money, Bailey removed it from his right front pants pocket, put it on the desk, and made a statement

that no fingerprints would be found on the money. The money was wrapped in white paper. Bailey also said that he had talked to two officers about what was happening, but gave no specific information about these contacts. Tr. 38-575-47, 36-568-34 to 36. Bailey then requested an attorney and questioning ceased.

What Bailey's version of the arrest and the events leading up to it add to this account is insubstantial. Bailey's story reveals that Jerkins handed him a sock full of money, which he took because he knew he was supposed to confiscate contraband in the jail. According to Bailey, he dumped the money onto a piece of white paper, hoping to preserve the fingerprints of whomever had given the money to Jerkins. At first, Bailey put this bundle into a desk, and then twice tried with no avail to reach a supervisor. When Bailey noticed several inmate-trustees approaching, however, he feared for the money's security and removed it from the desk and placed it in his pocket. He then went about his duties of overseeing inmate feeding, thinking that he would notify a supervisor once that duty was finished. He was arrested while attending to this duty.

C. Bailey's Suspension

On the morning of his arrest, Bailey was given a letter written by Allison suspending him without pay "as of 0700 hours May 14, 1987" and stating that dismissal proceedings would be taken against him if he had not "rectified the prerequisites of his job within 15 days." Bailey was then notified a second time that he was suspended without pay. By letter dated May 26, 1987, Allison advised Bailey that "effective today, you are hereby placed on suspension without pay until further notice." The parties' third communication was a November 19, 1987 letter from Bailey to Caldwell (Alachua County's Director of Corrections) asking for reinstatement, or a hearing if reinstatement was denied, or information on

how to reqest a hearing if he was proceeding improperly. A decision by the State Attorney's Office to enter a *nolle prosequi* as to all criminal charges filed against Bailey had prompted this letter to Caldwell. Caldwell directed Bailey's letter to Allison,[2] who responded on December 7, 1987 by denying Bailey's request and noting that his "leave without pay" would continue pending the completion of an investigation. ACDC had requested that the Florida Department of Law Enforcement (FDLE), the body charged with certifying Florida's law enforcement officers, investigate the possibility of decertifying Bailey.

The FDLE informed Caldwell that there was no basis for further action against Bailey via letter of June 9, 1988. Garrahan then requested that FDLE reopen its investigation, the status of which was uncertain at the time of trial. Caldwell, however, instructed Edward A. Royal, who replaced Allison when he left ACDC on February 13, 1988, to order Bailey back to work. By letter dated June 15, 1988, Royal informed Bailey that he would receive back pay and ordered him to report to work on June 20, 1988.

D. Bailey's Reinstatement

Bailey reported to work on June 20, with his lawyer and a letter from his psychiatrist in tow. Dr. Waldman, who had been treating Bailey since March 1988, Tr. 24-572-177, advised Bailey against returning to work at ACDC at that time. Thus, Bailey requested his back pay and asked that he be placed on sick leave until his benefits were exhausted, then placed on annual leave. *See* Plaintiffs Exhibit 13-A (Bailey's counsel's letter); Deposition Exhibit 52 (Bailey's hand-delivered letter to this effect). The following day, Dr. Waldman initiated an involuntary commitment to Shands Hospital on behalf of Bailey. Dr. Waldman diagnosed Bailey as suffering from a psy-

[2] Caldwell was no longer Director of Corrections; Allison was Acting Director of Corrections.

chotic breakdown and considered him to be a threat to himself and others (particularly at ACDC). Bailey's status at Shands was subsequently converted to voluntary and he remained there for about five weeks.

Although Royal's June 15, 1988 letter promised Bailey "any and all back pay and entitlements," no monies were tendered to Bailey until September 29, 1989, almost a year after Bailey filed this lawsuit. *See* Defendant's Exhibit 4. The record is unclear as to whether this was an unconditional tender of back pay or an effort at settlement. *See* Defendant's Exhibit 5. In any case, it is uncontroverted that the check (wherever and whatever it may be) has not been cashed. Tr. 32-480-29 to 32. The record also leaves unclear Bailey's status with ACDC at the time of trial. No hearings have been held regarding Bailey's employment status with ACDC.

II. PROCEDURAL HISTORY

Bailey's First Amended Complaint (the "Complaint") sought compensatory, punitive and injunctive relief pursuant to 42 U.S.C. § 1983 and state law. The Complaint alleged under § 1983 that the defendants deprived Bailey of liberty and property without due process of law, and conspired to do so, by arresting him without probable cause, publicizing the arrest, and subsequently suspending him. The Complaint also alleged pendent state-law causes of action based on false arrest, malicious prosecution, evil conspiracy, and violation of state civil rights. For analytical ease we have classified Bailey's claims into five categories: (1) Bailey's § 1983 claim that various defendants violated his due process rights by depriving him of a protected property interest in his employment by suspending him without pay and without granting him a hearing (the "procedural due process claim"); (2) Bailey's § 1983 claim that various defendants violated his due process rights by depriving him of a protected liberty interest by maintaining stigmatizing information

in his personnel file and not granting him a name-clearing hearing (the "name-clearing hearing claim"); (3) Bailey's § 1983 claim that various defendants conspired to deprive him of his civil rights (the "conspiracy claim"); (4) all of Bailey's claims concerning his allegedly unlawful arrest and the publication to the news media of the arrest (the "arrest-related claims"); and (5) all of Bailey's remaining state claims and all of Lizzie Shirley Bailey's loss of consortium claims, none of which has been raised on appeal. Accordingly, we deem waived any challenge to the district court's orders on this final category of claims.

All defendants filed motions to dismiss and/or motions for summary judgment in response to Bailey's Complaint. In July 1990, the district court entered an omnibus order granting in part motions to dismiss or for summary judgment filed by various defendants. In that order, the district court granted summary judgment on the basis of qualified immunity as follows: to Brown, Allison, Caldwell, Cole and Hayes on Bailey's conspiracy and arrest-related claims; to Brown and Cole on Bailey's procedural due process claim; and to Allison, Caldwell and Hayes on part of Bailey's procedural due process claim (his "initial" suspension).[3] The district court denied Allison, Caldwell, Hayes and Alachua County qualified immunity as to Bailey's procedural due process claim regarding his "continued" suspension; denied Tileston, City of Gainesville, Alachua County, Garrahan, Strauss and Hindery qualified immunity as to Bailey's conspiracy and arrest-related claims; and denied Caldwell, Hayes, Alachua County, City of Gainesville, Hindery, Tileston, Strauss, Garrahan, and Brown qualified immunity with respect to Bailey's name-clearing hearing claim. The district court also dismissed all of Lizzie Shirley Bailey's

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[3] The district court's reference to "initial" and "continuing" suspension has resulted in substantial confusion. We resolve this issue infra at part III(A)(3).

loss of consortium claims, none of which is at issue in this appeal.

A five-week jury trial on Bailey's remaining claims began on July 9, 1990. On that date, the district court orally granted Allison summary judgment on all remaining claims, dismissing him from this litigation. At the close of Bailey's case, all defendants moved for directed verdicts on various grounds; the district court deferred ruling on the motions until the close of all evidence. At that time, the remaining defendants renewed their directed verdict motions and Bailey moved for directed verdict as well. The district court denied Bailey's motion, but granted directed verdicts for Tileston, Alachua County, City of Gainesville, Strauss, Garrahan and Hindery as to Bailey's conspiracy and arrest-related claims. The basis of the district court's ruling was that Tileston had probable cause to arrest Bailey. The district court also directed verdicts in favor of all defendants on all of Bailey's state claims, none of which is at issue in this appeal. Furthermore, the district court directed verdicts in favor of Tileston, City of Gainesville, Strauss, Brown, Garrahan and Hindery on Bailey's name-clearing hearing claim. These directed verdicts left three defendants (Caldwell, Hayes and Alachua County) and two claims (procedural due process and name-clearing hearing) for the jury. After the jury returned its verdict for Alachua County, and for Bailey against Caldwell and Hayes on both claims, Bailey, Caldwell and Hayes filed motions for directed verdicts, judgments notwithstanding the verdict, or a new trial. The district court denied all motions and this appeal followed.

III. DISCUSSION

A. Bailey's Appeal

1. *Arrest-Related Claims*

Bailey asserts that the district court erred in granting directed verdicts in favor of City of Gainesville, Alachua County, Hindery, Garrahan, Strauss and Tileston on his

arrest-related claims. In granting these six defendants directed verdicts, the district court first found that Tileston had probable cause to arrest Bailey. Bailey argues, however, that Tileston did not have probable cause to arrest him of any crime [4] and that the defendants conspired to, and did, falsely arrest and prosecute him. Furthermore, Bailey asserts that the defendants "individually and collectively possessed information that would lead a reasonable and honest person to know that he was innocent." Brief of Appellant 24. If Tileston had probable cause for the arrest, then these defendants did not violate Bailey's Fourth Amendment rights against false arrest as protected through § 1983. *See Marx v. Gumbinner*, 905 F.2d 1503, 1505-06 (11th Cir.1990) (existence of probable cause is an absolute bar to a § 1983 action premised on false arrest). Specifically, Bailey argues that the district court erred by taking the question of probable cause from the jury. We disagree. When considering whether a directed verdict should be upheld, our standard is the same as that applied by the district court. *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir.1989). Thus, we consider all the evidence and resolve all inferences in the light most favorable to the nonmoving party. If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people, in the exercise of impartial judgment, could not arrive at a contrary verdict, then the motion was properly granted. *Id.* A mere scintilla of evidence does not create a jury question;

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[4] Bailey's arrest report reflects a violation of Florida Statute § 843.11, conveying tools into jail to aid escape. Tileston's post-arrest investigation, however, led him to doubt that Bailey had been involved in the April escape attempt, and Bailey was subsequently charged with bribery, unlawful compensation and unlawful possession of $500 in the jail instead. Tr. 37-574-48; Ex. 31. Bailey's efforts to attach significance to this change, however, is unpersuasive. The validity of an arrest does not turn on the offense announced by the officer at the time of the arrest. *United States v. Saunders*, 476 F.2d 5, 7 (5th Cir.1973); *State v. Cote*, 547 So.2d 993, 996 (Fla. 4th DCA 1989).

there must be a substantial conflict in evidence to create a jury question. *Id.*

We (and the district court) must evaluate these facts and inferences according to the legal standard for probable cause.[5] Simply stated, that standard requires that an arrest be objectively reasonable under the totality of the circumstances. *See Illinois v. Gates*, 462 U.S. 213, 229, 103 S.Ct. 2317, 2327, 76 L.Ed.2d 527 (1983). A familiar formulation holds that a "law enforcement officer has probable cause to arrest a suspect if the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Von Stein v. Brescher*, 904 F.2d 572, 578 (11th Cir.1990). Probable cause requires more than mere suspicion, but does not require convincing proof. Indeed, "[t]he Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted." *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979).

The district court properly found that Tileston had probable cause to arrest Bailey by examining what the evidence revealed that Tileston knew at the time of the arrest. Tileston knew that an escape attempt had occurred at ACDC in April and that one of the inmates

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[5] We note that Bailey's briefs to this Court mistakenly conflated the standards that a court uses in ruling on a directed verdict motion and the standard that an arresting officer must use in determining whether probable cause for an arrest is present. An officer is not required, as Bailey argues, to resolve all inferences and all factual conflicts in favor of the suspect. An officer's decision to arrest a suspect may be objectively reasonable even though that officer has not specifically discarded every possible non-criminal explanation for the conduct that forms the basis for her decision to arrest a suspect. *See United States v. Pantoja-Soto*, 739 F.2d 1520 (11th Cir.1984), *cert. denied*, 470 U.S. 1008, 105 S.Ct. 1369, 84 L.Ed.2d 389 (1985).

involved in that escape attempt had implicated Bailey. Tileston had investigated this tip by interviewing Jerkins personally and by checking Jerkins' reliability with city and county law enforcement officers even though Tileston was already familiar with Jerkins. Bailey did not controvert this at trial. Tileston also knew that Cole had heard a comment regarding the $500 transmitted through Jerkins' body bug around midnight. At trial, Bailey admitted that around midnight Jerkins had said "I want out. I want to get out. I've got $500 for you now and $1,000 for you Sunday night," and that Bailey had responded by telling him to "stay cool." Tr. 24-572-140. Bailey also admitted that he never notified anyone of Jerkins' midnight bribe attempt during his shift. Tr. 25-573-61 to 65. Although Bailey testified that he had twice *attempted* to notify his sergeant *after* taking the money from Jerkins, he admitted that he did not succeed in communicating with anyone. The district court accepted Bailey's testimony regarding his notification attempts as true, but correctly noted that it was also true that Bailey did not communicate this fact to anyone "at, near, or after his arrest." Tr. 39-576-109. Furthermore, Tileston knew that the money had passed to Bailey through Brown's verification. *Id.* at 112-13. And finally, Tileston knew that Bailey said nothing about having the money in his pocket when confronted in his work area, when walking to Allison's office, and when informed he was under arrest in Allison's office. Only when asked did Bailey turn over the $500.

Moreover, in directing a verdict for these defendants based on probable cause, the district court properly accepted as true Bailey's version of the events. *See* Tr. 39-576-107 to 114. The flaw in Bailey's efforts to undermine Tileston's probable cause is that Bailey's version of the facts failed to create a substantial conflict in what Tileston knew at the time of the arrest.[6] For instance,

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[6] Bailey argues that Cole, not Tileston, arrested him. Bailey has not shown a substantial conflict in the evidence regarding who

Bailey makes much of his prior communications with Strauss, Garrahan and Phillips regarding inmate contacts. Bailey testified that he had previously talked with Strauss regarding inmate contacts and that he had written Garrahan a letter in February 1987 regarding inmate contacts, which Garrahan referred to Strauss. Bailey also testified that he told Strauss that he had been approached again by an inmate [7] as Strauss was leaving ACDC and Bailey was arriving the evening prior to Bailey's arrest. Furthermore, Bailey testified that he told Phillips, the corrections officer on duty with Bailey the night of his arrest, generally about *prior* inmate contacts and his communications with Strauss and Garrahan. Although the lack of communication among ACDC personnel is unfortunate,[8] none of Bailey's prior discussions

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arrested him. Testimony from Bailey, Tileston, Brown and Cole supports that it was Tileston who arrested Bailey. Bailey takes Cole's statement that an arrest may have "technically" occurred when he and Tileston first confronted Bailey rather than later in Tileston's office out of context to make this argument. We need not decide this issue, because we find that Tileston had probable cause to arrest Bailey at either point. Tileston testified that he made the decision to arrest Bailey in Allison's office after learning that the money had passed from Jerkins to Bailey. Thus, from the time Tileston left that office to confront Bailey and bring him back to Allison's office, no facts changed that would disturb the district court's probable cause decision.

[7] Unknown to Tileston (or anyone else), Jerkins had taken it upon himself to phone Bailey at home during the afternoon prior to Bailey's arrest in an unplanned effort to further entice Bailey into conversation with him.

[8] Moreover, ACDC's poor communication was enhanced by the nature of an undercover internal investigation, where the methodology involved isolation and deference to a "need to know" communication standard. In addition, Bailey's prior communications were all vague or general references to inmate contacts—none mentioned Jerkins (or anyone else) by name. This level of generality made it less likely that these communications would have retained significance in the minds of Garrahan and Strauss in the face of their (and others') testimony that inmate contacts are a common problem that

was reported to Tileston. The record is clear that Tileston did not know of these prior communications until months after the arrest. It was also uncontroverted that Strauss told *no one* of Bailey's comment during shift change the evening prior to Bailey's arrest. Bailey also points to the fact that Brown had not given Tileston his written investigative report concerning the April escape attempt, and argues that had he done so Tileston would have known that he was innocent. Bailey, however, overstates the significance of this omission. Brown's written report, apparently unlike his oral report to Tileston, would have told Tileston that Tribuani had confessed to his role in the April escape attempt. The report would not have definitively established the source of the hacksaw blades used in that escape attempt, nor would it have ruled out the possibility that another escape attempt (involving Bailey) was being formulated. Thus, none of these factors that Bailey points to undermine what Tileston did know at the time of the arrest;[9] none of these factors undermine the district court's determination that Tileston had probable cause to make that arrest.[10] Ac-

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jail personnel must handle. In any case, Bailey's arguments that communication between the ACDC officers should have been better are misdirected. Negligent acts do not give rise to § 1983 liability. *Daniels v. Williams*, 474 U.S. 327, 336, 106 S.Ct. 662, 667, 88 L.Ed.2d 662 (1986).

[9] At trial, each officer asked testified that Bailey should have immediately notified his superior when Jerkins attempted to bribe him and especially when he actually accepted the $500. They also testified that Bailey could have interrupted his feeding duty with no breach of security to notify someone that he had just confiscated $500. *See, e.g.*, Tr. 28-562-255 to 257. Once again, Bailey's arguments that he might have taken the $500 because it was contraband, not because he was taking a bribe (like his explanation of why he had the money in his pocket), affect his ultimate guilt or innocence, not the reasonableness of Tileston's decision to arrest him. To restate, Bailey did not have to be guilty to be arrested.

[10] Although the district court indicated that the defendants were entitled to the protection of qualified immunity once probable cause

cordingly, we agree that Tileston had probable cause to arrest Bailey and we affirm the district court's final judgments for all defendants with respect to all of Bailey's arrest-related claims.

2. *Conspiracy Claims*

As noted above, Bailey's theory of this case was not only that the defendants had falsely arrested him, but also that they had *conspired* to deprive him of his civil rights by arresting, jailing and suspending him without due process of law. The district court, however, found that there was a "total lack of evidence" to support Bailey's theory that Alachua County, Hindery, City of Gainesville, Strauss, Tileston and Garrahan conspired to deprive him of his property and liberty by falsely arresting him, jailing him, and suspending him from his job. Tr. 39-576-114. Our *de novo* review of the record supports the district court's conclusion. No reasonable juror could have found a conspiracy because Bailey presented no evidence of one. To prove a 42 U.S.C. § 1983 con-

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was found, see Tr. 39-576-113-14, we note that granting qualified immunity on this basis was an unnecessary step. If probable cause is present, there is no need for the defendants to rely on the qualified immunity defense. "The existence of probable cause . . . is an absolute bar to a section 1983 action for false arrest." *Marx v. Gumbinner*, 905 F.2d 1503, 1505-06 (11th Cir.1990). Because we uphold the district court's finding of probable cause, we do not address the question of whether the defendants may have been entitled to qualified immunity in the absence of probable cause. Although several defendants argue that only "arguable probable cause" is necessary for qualified immunity, we do not reach that issue. *Compare Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) ("In determining whether qualified immunity exists, the issue is 'not probable cause in fact but "arguable" probable cause,'" quoting *Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir.1989), in turn quoting *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir.1985)) *with Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir.1985) (en banc) (Judge Posner noting that giving defendants an opportunity for qualified immunity in the absence of probable cause gives them "two bites at the apple").

spiracy, a plaintiff "must show that the parties 'reached an understanding' to deny the plaintiff his or her rights [and] prove an actionable wrong to support the conspiracy." *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir.1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 2053, 114 L.Ed.2d 459 (1991). This, Bailey did not do. Indeed, the record in this case reveals just the opposite of conspiracy. Whereas the linchpin for conspiracy is agreement, which presupposes communication, the defendants in this case suffered from an extreme lack of communication. Thus, we agree with the district court that Bailey failed to establish his conspiracy theory of liability and affirm the district court's final judgments for all defendants on this claim.

3. *Procedural Due Process Claims*

a. Against Caldwell, Hayes and Allison

As a public employee, Bailey possessed a property right in his continued employment with ACDC. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-10, 33 L.Ed.2d 548 (1972). Indeed, this question does not seem to have been disputed below. What is disputed is whether Bailey was deprived of that property right without due process of law—that is, what process was Bailey due and what did he receive? In answering that question, we note that neither the personnel policies of Alachua County nor the state law of Florida provides the answer. Rather, federal constitutional standards determine what process Bailey was due. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492, 84 L.Ed.2d 494 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982). Bailey challenges several issues related to his suspension without pay from ACDC. First, the district court initially granted Allison, Caldwell, Hayes and Alachua County summary judgment as to Bailey's "initial suspension" without pay in its July or-

der. Confusion has reigned since. Bailey argues that by "initial suspension," the district court meant Allison's May 14th letter. Thus, according to Bailey, the court left open a window of potential liability beginning on May 26th when Allison wrote Bailey a second letter suspending him without pay. Bailey, however, argues that the district court erred in not leaving this window open as of May 14. Caldwell, Hayes and Alachua County argue that the district court's "initial suspension" freed them from liability up to the point at which Bailey's criminal charges were dropped and he requested reinstatement and a hearing (November 19, 1987).[11] Although the parties participated in a lengthy argument on this point in chambers, the district court did not resolve the dispute at that time or thereafter. *See* Tr. 20-569-3 to 11. Caldwell and Hayes also assert that perhaps their window of liability opened as late as February 13, 1988. On that date Allison left ACDC: since the district court had granted summary judgment to Allison on the procedural due process claims because "he was already gone," Caldwell and Hayes reason that they, too, must be free from liability for this period because it was Allison who actually wrote all three letters to Bailey.

Fortunately, we need not affix dates to Bailey's procedural due process claims to resolve this confused issue. Rather, as developed below, we separate Bailey's procedural due process claim into two strands: (1) his claim that he was deprived of due process when he was suspended without pay at the time of his arrest on May 14, 1987 without notice or an opportunity for a hearing (the "predeprivation procedural due process claim"), and (2) his claim that he was deprived of due process when ACDC continued his suspension without pay after May 14, 1987 without notice and an opportunity for a hear-

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[11] Caldwell and Hayes, in their cross appeal, argue that they were entitled to qualified immunity as to Bailey's entire procedural due process claim. We address this argument in part III(B)(1)(b) below.

ing (the "postdeprivation procedural due process claim"). The district court stated in its July order that "they [Allison, Caldwell and Hayes] reasonably believed that Bailey's suspension without pay without a predeprivation hearing was lawful, considering the seriousness of the charges against him." R. 388. The district court then granted qualified immunity to Allison, Caldwell, and Hayes for Bailey's initial suspension. We think that the proper interpretation of the district court's ruling is that Bailey had not carried his burden of demonstrating that the law was clearly established that he had a constitutional right to a predeprivation hearing before being suspended. To defeat a qualified immunity defense, Bailey was required to show that the defendants violated a clearly established statutory or constitutional right of which a reasonable person would have known. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985); *see also Rich v. Dollar*, 841 F.2d 1558, 1563-64 (11th Cir.1988) (explaining shifting burdens of proof once defendant raises affirmative defense of qualified immunity). In deciding whether a constitutional right is clearly etsablished, we must judge the contours of the law at the time the employment decision was being made, irrespective of subsequent developments in the law. Thus, public officials are charged with keeping abreast of the current state of the law, not with anticipating changes. Whether the law is "clearly established" is a quesion of law that we review *de novo*. *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991). We agree with the district court that Bailey did not carry his burden of establishing that he had a clearly established constitutional right to a predeprivation hearing.

In *Parratt v. Taylor*, 451 U.S. 527, 539-40, 101 S.Ct. 1908, 1914-15, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Supreme Court stated that the requirement of a hearing does not always require the state to provide a hearing *prior* to the

initial deprivation. "[T]he necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Id.* 451 U.S. at 539, 101 S.Ct. at 1915. After noting that the "fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner,' " the Court confirmed that it had "rejected the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property." *Id.* at 540, 101 S.Ct. at 1915 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)); *see also Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (delay of nine months in providing postdeprivation hearing not constitutionally infirm).[12]

In applying this flexible legal standard regarding predeprivation due process to the facts of this case, we con-

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[12] The flexibility in the constitutional requirements pertaining to a predeprivation hearing derives from the balancing approach first enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The need for some form of predeprivation hearing is determined from balancing the competing interests at stake. "These are the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." *Loudermill*, 470 U.S. at 542-43, 105 S.Ct. at 1493-94 (citing *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903). Thus, while we agree with Bailey that in the usual case notice and an opportunity to be heard before being deprived of a property interest reflects standard due process requirements, Bailey did not succeed in demonstrating that the particular circumstances of his case made it unreasonable for Caldwell, Hayes and Allison to believe that it was lawful to forego a hearing prior to May 14 when Bailey was arrested and suspended.

clude that Bailey did not establish that Caldwell, Hayes and Allison reasonably would have known their action in initially suspending him without pay upon his arrest was unlawful. A corrections facility's paramount concern is security; a guard suspected of corruption compromises that security. Therefore, the defendants could have reasonably believed that this was a situation with a "necessity for quick action" that made a predeprivation hearing impracticable. Furthermore, the defendants were all aware that Alachua County's personnel regulations provided an appeal procedure for employees to contest disciplinary action taken against them. It would have been reasonable for the defendants to believe that these procedures were capable of providing Bailey an adequate postdeprivation remedy. Thus, we agree with the district court's ruling that Caldwell, Hayes and Allison are entitled to qualified immunity with respect to Bailey's procedural due process claims regarding his right to a predeprivation hearing.[13]

The district court correctly allowed Bailey's postdeprivation procedural due process claim to remain viable, however, and it ultimately went to the jury against Caldwell, Hayes and Alachua County. It should also have gone to the jury against Allison. Section 1983 requires proof of an affirmative causal connection between the official act or omission complained of and the alleged con-

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[13] Although Bailey argues that he could have been suspended with pay from the beginning, we do not think that he carried his burden of establishing that the contours of that right were clearly established at the time in question. His only source of this option is one sentence of dicta in *Loudermill:* "[I]n those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *Loudermill*, 470 U.S. at 544-45, 105 S.Ct. at 1494-95. While we agree that the problem of a post-deprivation remedy may be avoided by suspending with pay, for then there is not a deprivation, we do not think that by pointing to one sentence Bailey carried his burden of showing that suspension with pay in the circumstances of this case was required by clearly established law.

stitutional deprivation. *See Williams v. Bennett*, 689 F.2d 1370, 1380-81 (11th Cir.1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983). Allison did not leave his employment with ACDC until February 13, 1988; all three letters from Allison to Bailey regarding his suspension [14] were sent before that time (May 14, May 26 and December 7, 1987). At trial, Allison testified that he consulted with Caldwell and Hayes and received their approval for the action he took against Bailey on May 14. Tr. 28-562-1172 to 174. Although Hayes, who was Alachua County's Personnel Director, denied the degree of consultation that Allison attributed to her, *see* Tr. 29-563-91, 92, as did Caldwell, *see* Tr. 29-563-116, 117, Bailey established sufficient evidence to warrant jury consideration of Caldwell and Hayes' personal involvement. For instance, Hayes testified that "[i]t would be my responsibility to ensure that these [lengthy suspensions without pay] situations don't happen." Tr. 29-563-69.[15] And Caldwell testified that he was the person "in charge of the administrative action taken against the Department of Corrections personnel." Tr. 29-563-122, 123. We conclude that Bailey presented sufficient evidence so that a reasonable jury could find the requisite causal connection between the acts or omissions of each of the three defendants and his alleged deprivation with respect to his employment with ACDC. The jury is the appropriate body to resolve any factual conflicts in the

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[14] We note that although various defendants have argued at various points that the wording "leave without pay" (December 7 letter) as opposed to "suspension without pay" (May letters) is significant, we disagree. In the face of uncontroverted evidence that no hearing or other administrative proceeding was held to determine Bailey's status, this semantic difference is insignificant for our purposes. Indeed, Bailey's status with ACDC was still uncertain at the time of trial. *See, e.g.*, Tr. 29-563-122 (testimony of Caldwell).

[15] Hayes also testified that as of May 1987 she was aware of court precedent on "giving the employee a hearing to air his side of or his position when he was subjected to disciplinary proceedings or suspension proceedings." Tr. 29-563-68, 69.

evidence and to make credibility determinations where applicable. There is nothing in the record to support a principled legal distinction between Allison, Caldwell and Hayes in regard to Bailey's postdeprivation procedural due process claims. Allison should have gone to the jury along with Caldwell and Hayes on Bailey's postdeprivation procedural due process claims; he was not entitled to summary judgment because he was "already gone" as the district court held.

b. Alachua County

Bailey also argues that Alachua County should be held liable on his procedural due process and name-clearing hearing claims and that the district court erred by refusing to grant either his motion for directed verdict or his motion for judgment notwithstanding the verdict as to Alachua County. Our standard of review on this issue is the same as discussed above in reference to a directed verdict motion. *See supra* part III(A)(1). We find firm support for the jury's verdict for Alachua County in the record. A local government cannot be held liable for its employees' acts under § 1983 on a theory of respondeat superior; the liability must be founded on an official policy or custom. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). An isolated decision by a municipal employee constitutes official policy only if that employee has "final policymaking authority" for the challenged act under state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988). In this case, the record is devoid of evidence that either Caldwell, Hayes or Allison had "final policymaking authority" for Alachua County's personnel policy. Testimony at trial was unequivocal that final policymaking authority rested in the Board of County Commissioners. Furthermore, the record is also devoid of evidence that Alachua County had any official policy or

custom to deny Bailey any name-clearing hearing to which he may have been entitled. On the record before us, no reasonable jury could have found liability on the part of Alachua County for Bailey's procedural due process or name-clearing hearing claims. Thus, we affirm the district court's final judgment dismissing all of Bailey's claims against Alachua County.

In summary, as to Bailey's appeal we affirm all of the district court's judgments except for the dismissal of Allison from this litigation through summary judgment. Furthermore, we have clarified that the viable procedural due process claims remaining against Caldwell, Hayes and Allison are postdeprivation claims; the district court properly granted these three defendants qualified immunity as to Bailey's predeprivation procedural due process claims.

B. Caldwell & Hayes' Appeal

Caldwell and Hayes mount a two-pronged attack. First, they argue that they were entitled to qualified immunity on Bailey's procedural due process and name-clearing hearing claims and accordingly assert that the district court erred in not granting either their motions for summary judgment, their motions for directed verdict or their motions for JNOV. Second, they argue that several errors in the conduct of the trial warrant reversal of the jury's verdict. We discuss these two prongs of their argument below.

1. *Qualified Immunity*

a. Name Clearing Hearing.

Caldwell and Hayes argue that the district court erred in denying them qualified immunity with respect to Bailey's claim that they deprived him of a constitutionally protected liberty interest by not providing him a name-clearing for alleged stigmatizing information contained in his personnel file. In its omnibus July order, the dis-

trict court denied Caldwell and Hayes qualified immunity on this issue, subjecting them to liability on this claim from May 1, 1989 forward. Tr. 14-388-12. The court highlighted May 1, 1989 because of this Circuit's decision on that date in *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037 (11th Cir.1989). The district court reasoned that the law became "clearly established" on that date; thus, Caldwell and Hayes were not entitled to summary judgment on the basis of qualified immunity. Whether the law is clearly established is a question of law we review *de novo*. *Moore v. Morgan*, 922 F.2d 1553, 1556 (11th Cir.1991). We agree with Caldwell and Hayes that the district court erred in denying them qualified immunity on this claim; they were entitled to qualified immunity as a matter of law on this issue.

In deciding whether the law is clearly established, we ask whether the legal contours of the right at issue are clear and specific enough for a reasonable official to have known that her actions were unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987); *Courson v. McMillian*, 939 F.2d 1479, 1488 (11th Cir.1991). *Buxton* explicitly stated that it faced an issue of first impression in this Circuit in deciding whether placing stigmatizing information in the personnel file of a public employee constitutes publication sufficient to trigger the employee's right to procedural due process. *Buxton*, 871 F.2d at 1042. Thus, prior to *Buxton*, it was not clearly established that Bailey was entitled to a name-clearing hearing regarding alleged stigmatizing information in his personnel file. To hold Caldwell and Hayes accountable to Bailey for decisions rendered during the pendency of Bailey's litigation is to hold them to too stringent a standard. Caldwell and Hayes filed motions to dismiss this claim on the basis of qualified immunity on March 21, 1989, well before *Buxton* was decided. *See* R. 141. Caldwell and Hayes

are entitled to qualified immunity with respect to Bailey's name-clearing hearing claims; that issue should not have gone to the jury.[16]

b. Procedural Due Process Claim

Caldwell and Hayes also argue that they were entitled to qualified immunity with respect to Bailey's procedural due process claims. As noted above, the district court granted Caldwell and Hayes qualified immunity with respect to Bailey's "initial" suspension. We have concluded that this is best seen as granting Caldwell and Hayes qualified immunity for Bailey's predeprivation claim, and we uphold that decision. Caldwell and Hayes also argue that they are entitled to qualified immunity with respect to Bailey's postdeprivation claim. As noted earlier, here they ask too much. Although the district court did not explicitly rule on Caldwell and Hayes' qualified immunity defense, we interpret the district court's actions as rejecting that defense.[17] Furthermore, we agree that Cald-

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[16] Because we hold that Caldwell and Hayes qualifiedly immune as to Bailey's name-clearing hearing claim, we do not address the balance of their arguments on this claim such as whether any information in Bailey's file was "false."

[17] Caldwell and Hayes first assert that the district court erred in not explicitly ruling on whether they were entitled to qualified immunity, and then, by refusing to submit the issue of qualified immunity to the jury. This argument is contrary to the law in this circuit. *See Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir.1991) (qualified immunity is an affirmative defense from trial and not a defense to liability issues raised during trial, thus once it is denied pretrial, the jury should determine the factual issues without any mention of qualified immunity); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (qualified immunity is in essence an immunity from suit). We recognize, as did the panel in *Ansley*, that there is a split of authority in the circuits as to whether qualified immunity from damages may be asserted at trial and is properly included in jury instructions. *See Ansley*, 925 F.2d at 1345-48.

well and Hayes are not entitled to qualified immunity for Bailey's postdeprivation procedural due process claims.

Unlike his efforts regarding his predeprivation due process claim, Bailey has shown that the law was clearly established that he was due some "meaningful" process within a "meaningful" time. *See supra* part III(A)(3). Moreover, Bailey has shown a substantial conflict in the evidence that prohibits us from deciding whether Bailey received less process than he was due as a matter of law. At trial Caldwell, Hayes and Allison testified that they did not give Bailey notice of his appeal rights. The personnel procedures applicable to ACDC employees require that an employee receive notice of his appeal rights when disciplinary action is taken against him. Caldwell and Hayes attempted to deflect their technical noncompliance by arguing that Bailey had used the appeal procedure before and was already aware of it, thus obviating the need for them to provide him notice or at least making their failure to provide him notice harmless. The only evidence introduced by Caldwell and Hayes on this point, however, was letters from Bailey regarding some overtime pay he believed he had been shorted. *See* Plaintiffs Exhibit 201. Neither Bailey's handwritten letter regarding this overtime pay nor a typewritten letter that a secretary at ACDC had done for Bailey mention the appeal process to which Caldwell and Hayes referred. *See id.* Therefore, a jury could have reastonably resolved this fact-bound notice issue in Bailey's favor.

Furthermore, Caldwell and Hayes both asserted at trial that Bailey was not entitled to a hearing from ACDC until his criminal charges were dropped and that they would not have provided him with one had he made a request. Caldwell and Hayes' argument is that a hearing would have been futile while criminal charges were pending against Bailey, thus excusing them (at least up to that point) from not providing him with a hearing regarding

his employment with ACDC.[18] Their argument tries to prove too much: "The right to a hearing does not depend on a demonstration of certain success." *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 544, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985) (citing *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252 (1978)). Perhaps Bailey could have convinced ACDC to suspend him with pay or to place him in a non-security position during the pendency of the criminal action against him; perhaps Bailey would not have even appeared at his hearing. Simply put, the answers to these questions are irrelevant. Moreover, it is inconsistent for Caldwell and Hayes to argue both that the personnel regulations provided Bailey all the process he was due and in the same breath admit that they would not have given Bailey a hearing (or that he was not entitled to one) until his criminal charges were dropped. A jury is entitled to resolve this inconsistency as it sees fit. Moreover, Bailey did request a hearing—the day after he learned that his criminal charges had been dropped, which makes his request extremely timely if measured from the point at which Caldwell and Hayes testify the measurement should start. These are examples of factual disputes concerning Bailey's procedural due process claim that prohibit us from rendering a decision on this claim as a matter of law. These issues may be addressed more succinctly upon remand for a new trial against Caldwell, Hayes and Allison on Bailey's postdeprivation procedural due process claims. We have already concluded that Allison should have been a defendant in Bailey's postdeprivation due process claim and that Bailey's name-clearing hearing should not have gone to the jury. As discussed below, we also find that significant prejudicial errors were committed during the trial, requiring reversal of the jury's verdict for Bailey against Caldwell and Hayes.

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[18] Moreover, although closely factually related, the criminal process against Bailey would not have automatically resolved his employment rights with Alachua County.

2. *Trial Errors*

a. Motion to Sever

The first ruling that Caldwell and Hayes attack is the district court's refusal to sever the employment-related due process issues from the earlier false arrest, false imprisonment and conspiracy issues. They argue that a district court may order separate trials of any claims or issues "in furtherance of convenience or to avoid prejudice, or when separate trial will be conducive to expedition and economy." Fed.R.Civ.P. 42(b). Furthermore, Rule 21 provides that "any claim against a party may be severed and proceeded with separately." Fed.R.Civ.P. 21. We will not disturb a district court's decision not to order separate trials absent an abuse of discretion. *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1535 (11th Cir. 1985), *modified on other grounds*, 769 F.2d 1485 (11th Cir.1985). Although our review of the record in this case does not enable us to conclude that the district court's severance denial alone was an abuse of discretion warranting reversal of the jury's verdict, we do find that this issue raises substantial doubt and question that further reinforces our decision to reverse the jury verdict on the basis of the other errors we discern. We now turn to those errors.

b. Juror Johns

Caldwell and Hayes argue that the district court abused its discretion by refusing to exclude a juror (Johns) from the panel. The district court denied their counsel's request that Johns be stricken from the jury panel for cause (no preemptory challenges remained). Tr. 20-569-117 to 119. Our question on appeal is whether there is fair support in the record for the district court's conclusion that the juror would be impartial. *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892, 81 L.Ed.2d 847 (1984). We conclude that the required support is missing in this case. At the time of trial, Johns had been employed at

Shands Hospital for ten years in the psychiatric unit and was working as an administrative assistant to the Senior Director of Nursing. Tr. 20-569-50, 51, 67, 68. Before the trial, Johns knew both Bailey and Dr. Waldman, Bailey's treating psychiatrist and a witness in the case. Shands hospital is not only the institution at which Bailey was treated and in which Bailey was hospitalized for over a month, it was also his employer at the time of trial. Tr. 20-569-50 to 52. Thus, Johns was a coworker of Bailey's and of Dr. Waldman's. Johns testified that she knew many of the potential witnesses through her employment. Tr. 20-569-106, 107.

Johns' relationship to Bailey and to Dr. Waldman raised substantial doubts about her ability to serve as a juror fairly and impartially. What is more, the colloquy between Johns and the court did not dispel these doubts. "Doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid." *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir.1976).[19] The record in this case leaves juror Johns' impartiality in question. The record reveals that the district court interrupted Johns before letting her finish her response to questions about her knowledge of Bailey and his mental condition, leaving that issue inadequately explored.[20] Furthermore, Johns

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[19] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[20] One relevant portion of Johns discussion with the district court is as follows:

> THE COURT: [Anything about your knowledge of] Mr. Bailey that would, in any way, tend to influence your verdict in this case?
>
> MS. JOHNS: I don't feel so at all but—

responses to whether her connections to Bailey would make any difference to her ability to serve as an impartial juror were hesitant and equivocal.[21] Because Bailey's mental condition was a key issue at trial, and because the record discloses that Johns herself was uncertain about her ability to be impartial, we agree with Caldwell and Hayes that the district court abused its discretion in refusing to exclude Johns for cause. *See Depree v. Thomas*, 946 F.2d 784, 790 n. 11 (11th Cir.1991) (distinguishing between potential bias that further investigation eliminates

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THE COURT: Could you tell us how you know him through acquaintanceship at the hospital?

MS. JOHNS: That's awkward for me because at least my awareness of him has to do with a confidentiality issue at the hospital.

THE COURT: Does it have to do with any of his physical or mental condition?

MS. JOHNS: Yes, sir . . . .

THE COURT: [Y]ou have become aware of certain facts about Mr. Bailey or certain conditions, either emotional or mental that he may have or what?

MS. JOHNS: Only in the very broadest of sense. I do work with inpatient units, so I don't know anything in particular about him. I just know that he has been—

Tr. 20-569-51, 52.

[21] Johns' uncertainty is revealed in the following excerpt of her sidebar conference with the district court:

THE COURT: [Bailey] was a patient?

MS. JOHNS: He also is an employee at Shands. I've seen him as an employee.

. . . . . .

THE COURT: Would any of [this] make any difference to you sitting on the jury?

MS. JOHNS: I don't believe so but I'm not quite sure. I'm not the one to make that decision.

THE COURT: We wanted to know what you know about him.

MS. JOHNS: I have no personal connection at all.

THE COURT: Cause is denied. . . .

Tr. 20-569-119.

and potential bias that is either not adequately explored or not adequately eliminated by further investigation). In sum, we do not find fair support in the record for the district court's conclusion that juror Johns would be impartial.

c. Jury Instructions on Damages

Caldwell and Hayes contend that the district court abused its discretion in refusing to submit Caldwell and Hayes' requested instruction on damages to the jury. They argue that the district court's jury instruction on damages was prejudicial and misleading because it failed to separate the damages attributable to claims involving false arrest and imprisonment from the damages attributable solely to Bailey's procedural due process claims. We agree. Caldwell and Hayes asked the Court to instruct the jury that it could not award damages against them that were caused by the arrest, imprisonment or prosecution of Bailey. Instead, the court instructed the jury, *inter alia*, that "you should assess the amount you find to be justified by the preponderance of the evidence as full, just and reasonable compensation for all of the plaintiffs' [sic] damages." Tr. 42-578-17.

Judge Fay has recently explained this Court's approach in addressing a challenge to a denied jury instruction:

> On appeal, we examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled. The trial judge's refusal to give a requested instruction is not error where the substance of that proposed instruction was covered by another instruction that was given. If a requested instruction is refused and is not adequately covered by another instruction, the court will first inquire as to whether the requested instruction is a correct statement of the law. In such a scenario, if the requested instruction does accurately reflect the law, the next

> step is to assess whether the instruction addresses an issue that is properly before the jury. Even if both of these criteria are met, there must still be a showing of prejudicial harm that resulted from the failure of the trial court to give the requested instruction before the judgment will be disturbed on that ground.

Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1569 (11th Cir.1991) (citations omitted).

Applying this step-by-step analysis to the facts of this case, we conclude that the district court's refusal of Caldwell and Hayes' requested jury instruction was prejudicial error. First, the substance of Caldwell and Hayes' requested instruction was not covered by another instruction nor by the balance of the instructions as a whole. For five weeks the jury heard testimony regarding not only Bailey's alleged damages from a procedural due process violation, but also regarding his alleged damages from his arrest-related claims. This was because those claims were viable until the district court directed verdicts on them at the close of all testimony. On the eve of jury deliberations, the class of defendants suddenly decreased from ten to three. After that, any damage flowing from Bailey's lawful arrest was not compensable. Realizing that the jury had heard testimony regarding all of Bailey's damages, Caldwell and Hayes requested instruction endeavored to focus the jury on damages attributable to them.[22] Moreover, their requested instruction accur-

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[22] Although Caldwell and Hayes argue that Bailey did not prove that he was damaged by their alleged procedural due process violation, the record reveals that Bailey adequately proved damages. Medical experts for both sides testified that Bailey's mental condition was the result of the arrest, his suspension, and all events that followed. *See, e.g.*, Tr. 30-564-20; Tr. 23-571-113, 189, 190. Thus, we reject Caldwell and Hayes argument that Bailey did not prove that the alleged procedural due process violations were a cause of his mental deterioration. There is ample support in the record to conclude that a reasonable jury could have found that the claimed

ately reflected the law. Only those damages actually resulting from a procedural due process deficiency may be compensated. *Carey v. Piphus*, 435 U.S. 247, 264, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1978). Continuing Judge Fay's suggested analysis, the issue of Bailey's mental and physical damages was properly before the jury. Furthermore, the district court's refusal to give Caldwell and Hayes' requested instruction allowed the jury to consider all of the damages testimony they had heard throughout five weeks of trial. No instruction could have taken away all the testimony the jury heard regarding Bailey's conspiracy and false arrest claims. However, an instruction such as the one Caldwell and Hayes requested could have explicitly cautioned the jury that it should not consider damages attributable to the lawful arrest. The district judge's refusal of this instruction, combined with the failure of the instructions as a whole to specify the damages the jury could properly consider, prejudiced Caldwell and Hayes.[23]

In summary, as to Caldwell and Hayes' appeal, we find that the aggregate effect of several errors warrants reversal of the jury's verdict against Caldwell and Hayes: the district court's refusal to exclude juror Johns, its refusal of Caldwell and Hayes' requested damage instruction, its error in submitting Bailey's name-clearing hearing claim to the jury, and the substantial doubt and question raised by its refusal to sever the procedural due process claims from the other claims. We also find that the district court correctly denied Caldwell and Hayes qualified immunity with respect to Bailey's post-deprivation procedural due process claims. Thus, a new trial is necessary.[24]

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procedural due process violations were a significant cause of Bailey's physical and mental damages.

[23] Caldwell and Hayes unsuccessfully objected to the damage instructions given. Tr. 42-577-70.

[24] While we have considered the possibility of remanding solely on the issue of damages, this would not be appropriate for several

IV.

Accordingly, we AFFIRM the district court's elimination of all defendants except for Caldwell, Hayes and Allison. We REVERSE the district court's summary judgment for Allison on Bailey's procedural due process claim. We REVERSE the jury's verdict for Caldwell and Hayes, and REMAND for a new trial against Caldwell, Hayes and Allison on Bailey's postdeprivation procedural due proces claims. We AFFIRM the jury's verdict in favor of Alachua County. The elimination of the majority of original defendants and claims will lead to a much simpler and straightforward trial on remand. All that remains for the new trial is Bailey's postdeprivation procedural due process claim against Allison, Caldwell and Hayes. Bailey's motion for fees pursuant to 42 U.S.C. § 1988 is moot at this time.

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reasons. Foremost, we cannot say that the prejudicial jury instructions on damages, combined with the presence of juror Johns, who we have decided should have been excluded for cause, affected only the jury's assessment of damages against Caldwell and Hayes. Furthermore, we have also decided that Allison should have gone to the jury as well as Caldwell and Hayes and have noted considerable confusion throughout this trial on the procedural due process claims and the window of liability that was open against the defendants. We have also determined that the name clearing hearing issue should not have gone to the jury and have expressed doubts regarding the decision to not sever the due process claims from the dramatic claims regarding Bailey's lawful arrest. Thus, the cumulative effect of these problems is substantial enough to warrant a new trial for Caldwell, Hayes and Allison on the issue of Bailey's postdeprivation procedural due process claims. We note that Alachua County was not affected by the confusing damage instructions because the jury did not find the county liable on any of Bailey's claims. Our exhaustive review of the record in this case supports the jury's verdict that Bailey made no evidentiary showing on which a jury could reasonably find Alachua County liable.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and
LIZZIE SHIRLEY BAILEY,
Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF
ALACHUA COUNTY, FLORIDA, *et al.*,
Defendants.

ORDER

[Filed Mar. 4, 1991]

This cause is before the court on various outstanding motions. Plaintiff's motion for Judgment Notwithstanding the Verdict (Doc. 482) is DENIED; Defendant Caldwell's renewed motion for Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial (Doc. 485), is DENIED; Defendant Hayes' renewed motion for Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial (Doc. 487) is DENIED. The following motions will be ruled on by separate order:

1) City's motion for attorneys' fees (Doc. 505).

2) City's motion for costs (Doc. 506).

3) Plaintiffs' motion to strike City's motion for costs (Doc. 521).

4) County's motion to tax costs (Doc. 523).

5) Joinder of defendants' Garrahan, Brown, Strauss and Allison in County's motion to tax costs (Doc. 522).

6) Motion to tax costs by defendants Hindery and Cole (Doc. 524).

7) Defendant Tileston's motion for costs (Doc. 527).

8) Plaintiffs' motion to strike Tileston's motion for costs (Doc. 543).

9) City's motion to require plaintiffs to post bond (Doc. 545).

DONE AND ORDERED this 1st day of March, 1991.

/s/ Maurice M. Paul
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

vs.

ALACHUA COUNTY, L.J. "LU" HINDERY AS SHERIFF OF ALACHUA COUNTY, FLORIDA; CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN; and COLLEEN HAYES,
Defendants.

FINAL JUDGMENT

[Filed Aug. 30, 1990]

THIS ACTION was tried before the Court and Jury. The Court reserved ruling on a motion for directed verdict made by Defendant CITY OF GAINESVILLE, FLORIDA ("City") at the close of the Plaintiff's case. The City renewed its motion for directed verdict at the close of all of the evidence. On the evidence presented the Court granted the City's motion for directed verdict. Accordingly,

IT IS ADJUDGED

1. That all claims, actions, and causes of action by the Plaintiff against the City are dismissed with prejudice to the Plaintiff.

2. That the Plaintiff GREGG F. BAILEY take nothing by this action from the Defendant CITY OF GAINESVILLE, FLORIDA, and the City go hence without day.

3. That the City shall recover its costs from the Plaintiff GREGG F. BAILEY in an amount to be set by the Court upon the filing of a motion to tax costs by the City.

DONE and ORDERED in Chambers, at Tallahassee, Florida, this 30th day of August, 1990.

/s/ Maurice M. Paul
District Court Judge

COPIES FURNISHED TO:

All Counsel of record

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. 88-10198-MMP

GREGG FITZGERALD BAILEY and SHIRLEY BAILEY,
Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN, and COLLEEN HAYES,
Defendants.

FINAL JUDGMENT FOR DEFENDANT ALACHUA COUNTY

[Filed Aug. 30, 1990]

THIS ACTION was tried before the Court and Jury. The Court reserved ruling on a motion for directed verdict made by Defendant Alachua County (County), at the close of Plaintiff's case. The County renewed its motion for directed verdict at the close of all the evidence. On the evidence presented, the Court granted the County's motion for directed verdict on all issues except Plaintiff's claim of denial of procedural due process as it relates to his employment and the issue of failure to provide him a name-clearing hearing, which issue was submitted to the jury. The jury returned a verdict in favor of the County; accordingly,

IT IS ADJUDGED:

1. That all claims, actions, and causes of action by the Plaintiff against Alachua County are dismissed with prejudice to the Plaintiff.

2. That the Plaintiff, Gregg F. Bailey, take nothing by the action from the defendant, Alachua County, Florida, and the County go hence without day.

3. That the County shall recover its costs from the Plaintiff, Gregg F. Bailey, in an amount to be set by the Court upon the filing of a motion to tax costs by the County.

DONE AND ORDERED in Chambers at Tallhassee, Florida, this 30th day of August, 1990.

/s/ Maurice M. Paul
District Court Judge

Copies furnished to:

ALL COUNSEL OF RECORD

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA-88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; L.J. "LU" HINDERY, Sheriff of Alachua County, Florida; the CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN and COLLEEN HAYES,

Defendants.

FINAL JUDGMENT FOR DEFENDANTS STRAUSS & GARRAHAN

[Filed Aug. 30, 1990]

This action having been tried before the Court and a jury and the Court having granted Defendants Strauss and Garrahan's motion for directed verdict at the close of all evidence, it is accordingly

ADJUDGED:

1. That all claims, actions and causes of action by plaintiff against James Strauss and Stephen A. Garrahan are dismissed with prejudice.

2. That plaintiff take nothing from James Strauss and Stephen A. Garrahan.

3. That Defendants Strauss and Garrahan shall recover their costs from plaintiff in an amount to be determined by the Court upon the filing of a motion to tax costs.

DONE AND ORDERED in Chambers this 30th day of August, 1990.

/s/ Maurice M. Paul
United States District Judge

Copies to Counsel of Record

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE FLORIDA

Case No. GCA-88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; L.J. "LU" HINDERY, Sheriff of Alachua County, Florida; the CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN and COLLEEN HAYES,

Defendants.

FINAL JUDGMENT FOR DEFENDANT GARY BROWN

[Filed Aug. 30, 1990]

This action having been tried before the Court and a jury and the Court having entered summary judgment for Defendant Brown on the issues of the arrest, incarceration and prosecution of the plaintiff and also having entered summary judgment for Defendant Brown on the issue of any stigmatization caused by the arrest, incarceration and prosecution; the court having heard further argument at the close of all the evidence and upon motion of Defendant Brown dismissing the remaining issues against him, accordingly, it is

ADJUDGED:

1. That all claims, actions and causes of action by plaintiff against Gary Brown are dismissed with prejudice.

2. That plaintiff take nothing from Gary Brown.

3. That Defendant Brown shall recover his costs from plaintiff in an amount to be determined by the Court upon the filing of a motion to tax costs.

DONE AND ORDERED in Chambers this 30th day of August, 1990.

/s/ Maurice M. Paul
United States District Judge

Copies to Counsel of Record

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No.: GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

vs.

ALACHUA COUNTY, L.J. "LU" HINDERY AS SHERIFF OF ALACHUA COUNTY, FLORIDA; CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN; and COLLEEN HAYES,
Defendants.

FINAL JUDGMENT FOR DEFENDANT HINDERY

[Filed Aug. 30, 1990]

THIS ACTION was tried before the Court and Jury. The Court reserved ruling on a motion for directed verdict made by Defendant Hindery at the close of the Plaintiff's case. Defendant Hindery renewed his motion for directed verdict at the close of all of the evidence. On the evidence presented, the Court granted Defendant Hindery's motion for directed verdict. Accordingly,

IT IS ADJUDGED,

1. That all claims, actions, and causes of action by the Plaintiff against Defendant Hindery are dismissed with prejudice to the Plaintiff.

2. That the Plaintiff Gregg F. Bailey take nothing by this action from Defendant Hindery, and Defendant Hindery go hence without day.

3. That Defendant Hindery shall recover its costs from the Plaintiff Gregg F. Bailey in an amount to be set by the Court upon the filing of a motion to tax costs by Defendant Hindery.

4. That the Court will consider Defendant Hindery's entitlement to attorney's fees from the Plaintiff as a prevailing party pursuant to 42 U.S.C. § 1988 upon the filing of a motion by Defendant Hindery.

DONE and ORDERED in Chambers, at Tallahassee, Florida, this 30th day of August, 1990.

/s/ Maurice M. Paul
United States District Judge

Copies to:

All Counsel of Record

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA-88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

-vs-

ALACHUA COUNTY, L.J. "LU" HINDERY AS SHERIFF OF ALACHUA COUNTY, FLORIDA; THE CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN; and COLLEEN HAYES,
Defendants.

FINAL JUDGMENT FOR DEFENDANT JOHN STANTON TILESTON, JR.

[Filed Aug. 30, 1990]

This action was tried before the Court and jury and the Court reserved ruling on the Motion for Directed Verdict of Defendant John Stanton Tileston, Sr. at the close of Plaintiff's case. Defendant Tileston's Motion for Directed Verdict was renewed at the close of all evidence. Having heard argument and, based upon the evidence presented in Plaintiff's and Defendants' case, the Court granted Defendant Tileston's Motion for Directed Verdict. Accordingly, it is

ADJUDGED:

1. That all claims, actions, and causes of action by Plaintiff against John Stanton Tileston, Sr. are dismissed with prejudice.

2. That Plaintiffs take nothing from John Stanton Tileston, Sr.

3. That Defendant Tileston shall recover his costs from Plaintiff in an amount to be determined by the Court upon the filing of motion to tax costs.

DONE AND ORDERED in Chambers, at Gainesville, Florida, this 30th day of August 1990.

/s/ Maurice M. Paul
MAURICE M. PAUL
United States District Judge

Copies to:

Counsel of record

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiffs,

v.

ALACHUA COUNTY, *et al.*,
Defendants.

ORDER

[Filed Aug. 30, 1990]

The plaintiff's motion for new trial as to the defendants Hindery, City of Gainesville, Tileston, Strauss, Brown, Caldwell, Garrahan, and Alachua County (Doc. 483) is DENIED as to each defendant.

DONE AND ORDERED this 30th day of August, 1990.

/s/ Maurice M. Paul
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

GCA: 88-10198-MP

JUDGE MAURICE M. PAUL

GREGG FITZGERALD BAILEY

v.

BOARD OF COUNTY COMMISSIONERS, ALACHUA CO.,
NATE CALDWELL & COLLEEN HAYES

JUDGMENT IN A CIVIL CASE

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

That the plaintiff, GREGG FITZGERALD BAILEY, recover of the Defendant's NATHANIEL CALDWELL and COLLEEN HAYES, the sum of Two Million, One Hundred Eighty Two Thousand, Four Hundred Six ($2,182,406.00) Dollars with interest thereon at the rate of Seven decimal Eighty Eight (7.88) percent as provided by law, and his costs of action.

MARVIN S. WAITS
Clerk

/s/ Charles R. Cook
CHARLES R. COOK
(By) Deputy Clerk

[Filed Aug. 7, 1990]

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY,
Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; NATE CALDWELL; and COLLEEN HAYES,
Defendants.

VERDICT

[Filed Aug. 6, 1990]

WE, THE JURY, UNANIMOUSLY RETURN THE FOLLOWING VERDICT:

1. Do you find, by a preponderance of the evidence, that defendant, Alachua County, under color of state law, had a policy that intentionally deprived plaintiff of his property interest in his public employment, without due process of law, as secured to him by the Constitution of the United States?

Yes —— No ✓

2. Do you find, by a preponderance of the evidence, that defendants Nate Caldwell and Colleen Hayes, under color of state law, intentionally deprived plaintiff of his property interest in his public employment, without due process of law, by not granting him hearings to which he was entitled under the Constitution of the United States, and by continuing to deprive him of his job, his back pay and benefits without authority, after all the criminal charges against him had been dismissed?

Nate Caldwell	Yes ✓	No ——
Colleen Hayes	Yes ✓	No ——

3. Do you find, by a preponderance of the evidence, that defendant Alachua County, under color of state law, had a policy that intentionally deprived plaintiff of his liberty interest in his reputation, without due process of law, by continuing to maintain stigmatizing information in plaintiff's personnel files without offering him a hearing to clear his name?

Yes —— No ✓

4. Do you find, by a preponderance of the evidence, that defendants Nate Caldwell and Colleen Hayes, under color of state law, intentionally deprived plaintiff of his liberty interest in his reputation, without due process of law, by continuing to maintain stigmatizing information in plaintiff's personnel files without offering him a hearing to clear his name?

Nate Caldwell	Yes ✓	No ——
Colleen Hayes	Yes ✓	No ——

[If you answered "Yes" to any of the foregoing questions, please answer question 5.]

5. Please set forth, in dollar amount, such damage, if any, you find from a preponderance of the evidence, plaintiff has suffered for:

Lost wages/future earnings	$ 182,406
Mental or emotional distress (both past and future)	$1,300,000
Medical expenses (both past and future)	$ 700,000

SO SAY WE ALL.

Dated this 6th day of August, 1990, in Gainesville, Florida.

/s/ W. M. LANCASTER
Foreperson

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3590

GREGG FITZGERALD BAILEY, LIZZIE SHIRLEY BAILEY,
Plaintiffs-Appellees,

versus

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLA., EUGENE T. WHITWORTH, ETC., *et al.*,
Defendants,

JAMES STRAUSS, GARY BROWN, TOM L. ALLISON, NATE CALDWELL, STEPHEN CARRAHAN, COLLEEN HAYES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida

[Filed July 9, 1990]

Before TJOFLAT, Chief Judge, ANDERSON and EDMONDSON, Circuit Judges.

BY THE COURT:

Appellants' emergency motion for stay of trial pending appeal is DENIED.

Issued as Mandate: July 11, 1990

TJOFLAT, Chief Judge, specially concurring:

Plaintiff-appellee brought a civil rights action, under 42 U.S.C. § 1983, against governmental and individual defendants. Plaintiff also brought several state-law claims against the individual defendants. Five individual defendants are now appealing from the district court's denial of their motion for summary judgment based on qualified immunity with respect to the section 1983 claim; they request a stay of trial pending appeal.

I concur in the denial of the stay only because constrained to do so by circuit precedent. Under recent decisions of this court, we lack jurisdiction over the denial of a summary judgment motion based on qualified immunity as to certain claims if the defendants would have to proceed to trial on other claims, arising from the same facts. *Schopler v. Bliss*, No. 88-5609 (June 22, 1990); *Green v. Brantley*, 895 F.2d 1387 (11th Cir. 1990) (mandate withheld). I am convinced that these cases sweep too broadly and, when extended to a case such as this, result in bad law. In this case, if the individual defendants are entitled to qualified immunity on the section 1983 claims, the only claims remaining against them would be state-law claims. They would proceed to trial on the state-law claims only if the district court exercised its discretion to retain those claims, under pendent-party jurisdiction, in order to have the claims litigated at the same time as the section 1983 claim against the governmental defendants. *See Giardiello v. Balboa Ins. Co.*, 1566, 1570 (11th Cir. 1988).

I submit that it might well be an abuse of discretion for the district court to exercise pendent-party jurisdiction under these circumstances: a section 1983 plaintiff could then defeat appellate jurisdiction to review a district court's rejection of an individual official's qualified immunity defense merely by appending state-law claims. This sort of manipulation would obviously circumvent the

policy of *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985), which enables us to take jurisdiction over the denial of a motion for summary judgment based on qualified immunity in order to protect the defendant's entitlement not to stand trial in federal court if his conduct did not violate a right clearly established at the time.

For the foregoing reasons, I concur in the denial of the stay but express misgivings about the decisions that require this result.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA; L.J. "LU" HINDERY, Sheriff of Alachua County, Florida; the CITY OF GAINESVILLE, FLORIDA; JOHN STANTON TILESTON, SR.; JAMES STRAUSS; FARNELL COLE; GARY BROWN; TOM L. ALLISON; NATE CALDWELL; STEPHEN A. GARRAHAN and COLLEEN HAYES,

Defendants.

ORDER

[Filed Jul. 2, 1990]

Various defendants have filed motions to dismiss and for summary judgment. Based upon the following discussion, the motions are granted in part and denied in part.

OVERVIEW

This case arises out of the alleged false imprisonment of Gregg Fitzgerald Bailey, an Alachua County Detention Center (ACDC) officer. He alleges that he was the victim of an illegal sting operation conducted by officers of

ACDC, officers from three agencies acting as members of the Combined Narcotics and Organized Crime Unit (NOCU), and members of the state attorney's office.

Inmate Charles Jerkins was implicated in an April, 1987, escape attempt from ACDC, in which two other inmates were caught with hacksaw blades. Neither of the other inmates implicated Bailey. However, Jerkins suggested that a "professional" person was involved and promised cooperation in exchange for a transfer to a different area of the jail with more privileges.

The investigating officer at ACDC, Lt. Gary Brown, conferred with ACDC Assistant Director Tom Allison about the matter. Allison then conferred with ACDC Director Nate Caldwell, who authorized him to contact State Attorney Whitworth. With this approval, Allison instructed Brown to contact Whitworth. Whitworth instructed his investigator, John Tileston, to help ACDC. Tileston then contacted Basil Roundtree, commanding officer of NOCU, requesting help in executing the sting against Bailey.

The sting went as follows. On May 13, 1987, Jerkins was permitted to make a telephone call to Bailey. NOCU investigator Farnell Cole obtained bugging equipment and $500 from NOCU and took it to ACDC. With Allison's approval, recording equipment was set up in his office. Jerkins was brought to the office where ACDC Lt. James Strauss attached a body bug and gave him the $500.

When Bailey arrived for his shift late that evening, he told Strauss that an inmate had contacted him that afternoon, wanting him to take something out of the jail. Strauss allegedly told Bailey that he needed physical evidence before he could do anything about Jerkins. In the early morning, Bailey also told fellow ACDC officer C. W. Phillips about Jerkins' call the prior afternoon. In addition, Bailey told Phillips that he had previously written to ACDC Chief of Security, Maj. Stephen Garrahan, and had

talked to Strauss on several occasions about Jerkins improper contacts.

At about 6 a.m. on May 14, 1987, Jerkins and other inmates were allowed to enter the day room. A few minutes later, Jerkins signaled Bailey to come to the barred door separating the day room from Bailey's duty station. Jerkins handed a sock stuffed with $500 to Bailey. Bailey took the sock to a nearby desk, wrapped the money in a clean piece of paper, put the package in an unlocked drawer and returned the sock to Jerkins. Bailey asserts that he then tried twice to call his supervisor.

Bailey also asserts that he then saw inmate trustees approaching the unlocked desk as they brought breakfast to the other inmates. Thinking the money was at risk in the desk, Bailey put the money in his pocket and began supervising the inmates' meal. A few minutes later, Bailey was arrested for introducing hacksaw blades into the jail to aid an attempted prison escape. Immediately after the arrest, Bailey was given a letter informing him that dismissal proceedings would be started if he did not rectify the prerequisites of his job within 15 days. Bailey spent four days in jail before being released on bond. Effective May 26, 1987, he was suspended without pay until further notice.

On May 14, 1987, NOCU issued a news release about Bailey's arrest to the Gainesville area media. Caldwell and Allison also made statements about the arrest to WCJB television.

On July 8, 1987, the State Attorney's office filed criminal charges against Bailey for bribery, unlawful compensation and unlawful introduction into or possession of $500 in ACDC. On November 24, 1987, a *nolle prosequi* was entered for all charges against Bailey.

After the charges were dropped, Bailey wrote Caldwell requesting reinstatement with back pay and asking for a hearing if his request was denied. On December 7, 1987,

Allison wrote Bailey, denying his request. No hearing was held. On December 8, 1987, Garrahan wrote to the Florida Department of Law Enforcement (FDLE) regarding an investigation of Bailey. FDLE stated in a June 9, 1988, letter that there was no basis for further action against Bailey. Caldwell requested the investigation be reopened, and the investigation remains open today.

Bailey was ordered to return to work on June 20, 1988, and was informed that he would receive back pay. His psychiatrist advised against returning to work. Bailey presented a letter from his psychiatrist to ACDC and requested to be placed on sick leave. This request has never been granted.

ELEVENTH AMENDMENT IMMUNITY

Hindery, who is sued only in his official capacity as Alachua County Sheriff, asserts that he is a state officer and, therefore, entitled to summary judgment based on eleventh amendment immunity. As authority, Hindery relies on *Hamm v. Powell*, 874 F.2d 766, 770 (11th Cir. 1989), *modified on reh'g*, 893 F.2d 293 (11th Cir. 1990), *cert. denied sub nom., Hamm v. Norred*, No. 89-1699, 1990 WL 60615 (U.S. S. Ct. June 18, 1990). In that case, the court simply stated that Florida sheriffs are state officers and cited *Beard v. Hambrick*, 396 So. 2d 708 (Fla. 1981), to explain its statement. *Id.* at 770 & n.3.

On rehearing, the Eleventh Circuit withdrew the portion of its opinion discussing eleventh amendment immunity, simply stating that it need not reach that question. That question, however, clearly needs resolution in this case.

Plaintiffs assert that the decision in the original *Hamm* opinion is in conflict with other Eleventh Circuit decisions holding that Florida sheriffs are county officers and,

as such, are not entitled to eleventh amendment immunity. Plaintiff's assertion is very persuasive. Based on the following discussion, summary judgment on the issue of eleventh amendment immunity for Hindery is DENIED.

In *Lundgren v. McDaniel*, 814 F.2d 600, 605 & n.4 (11th Cir. 1987), another Eleventh Circuit panel noted that under the Florida Constitution, sheriffs are county officers. That panel concluded that the eleventh amendment did not bar suit on a pendant state claim against a sheriff, because he was not a state officer. Again in *Lucas v. O'Loughlin*, 831 F.2d 232, 234-35 (11th Cir. 1987), *cert. denied sub nom., St. Johns County v. Lucas*, 108 S. Ct. 1595 (1988), an Eleventh Circuit panel determined that "although elected by virtue of state law, he was elected to serve the *county* as sheriff." *Id.* (emphasis added). Under this scenario, actions of the sheriff were actions of the county. Finally, in *Owens v. Fulton County*, 877 F.2d 947, 950 (11th Cir. 1989), a panel ignored the original *Hamm*, decided less than two months earlier, and cited *Lucas* for the proposition that the court relies on state law in determining whether sheriffs are county officers.

The Florida Supreme Court case erroneously cited in *Hamm* for the proposition that Florida sheriffs are state officials, actually states unequivocally that sheriffs are county officers. "In our opinion, there is no reasonable way to construe article VIII, section 1, [of the Florida Constitution] other than to include sheriffs as well as other named county officers as part of a county . . . ." *Beard*, 396 So. 2d at 711. The Florida Supreme Court determined that as part of the county, sheriffs were subject to Florida's statute waiving sovereign immunity for "state agencies or subdivisions" which, under the act, included "counties and municipalities." *Id.* at 711-12, 709 n.1.

Apparently in Florida, *sovereign immunity* is much broader (including municipalities and local governments)

than *eleventh amendment immunity*. The eleventh amendment shields only *states* from suit in federal court, and there is no indication that Florida, instead of Alachua County, would have to provide funds to pay a judgment against Sheriff Hindery. *See Lucas*, 831 F.2d at 234 (counties liable for sheriff's department salaries and expenses); *Lundgren*, 814 F.2d at 605 n.4 (no facts to support contention that judgment against sheriff's office must be paid from state treasury rather than from county funds); *Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987), *cert. denied*, 484 U.S. 1064, 108 S. Ct. 1024 (1988) (sovereign immunity and eleventh amendment immunity are distinct concepts).

QUALIFIED IMMUNITY

Several defendants assert that they are entitled to qualified immunity for their actions concerning Bailey. James Strauss and Gary Brown are lieutenants with the Alachua County Department of Corrections. Tom L. Allison is the assistant director of ACDC. Nate Caldwell is the director of ACDC. Stephen A. Garrahan is chief of security for ACDC. Colleen Hayes is personnel director of ACDC. Farnell Cole is a deputy sheriff assigned to NOCU. And finally, John Tileston is an investigator with the state attorney's office.

The qualified immunity defense was articulated by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982). In *Harlow*, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S. Ct. at 2738. The Supreme Court further explaned this "objective (albeit fact-specific)" test in *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987). The relevant question in each case is "whether a reasonable officer could have believed

[his or her conduct] to be lawful, in light of clearly established law *and the information [he or she] possessed.*" *Id.* at 3040 (emphasis added).

Bailey asserts that reasonable people in these defendants' positions would have known an arrest without probable cause violates clearly established law. After *Creighton*, however, this assertion sweeps too broadly. The relevant inquiry is whether each individual would have known that his or her actions violated clearly established law in light of the information that individual possessed at the time. Therefore, each individual must be considered separately to determine whether qualified immunity applies.

Bailey asserts that inquiry into the actual knowledge of each individual is not necessary. He suggests that in a conspiracy, as alleged in this case, each conspirator is charged with the knowledge and illegal actions of all co-conspirators. This is because each conspirator is considered the agent of every other conspirator.

Bailey's argument fails on one important point. To be held accountable for the wrongful acts of a conspiracy, one must be aware of the illegal purpose of the conspiracy. Merely "conspiring" or working together to make what appeared to be a legal arrest would not subject an individual to liability for the illegal acts of co-workers. Thus, what an individual actually knew or reasonably should have known is an important factor to consider in determining whether he or she entered an illegal conspiracy or is entitled to qualified immunity.

Bailey asserts that he told both Garrahan and Strauss that Jerkins had made several attempts to get Bailey to smuggle contraband into the jail. The last time Bailey told Strauss that Jerkins had made an improper contact was the day of Bailey's arrest. Bailey states that Strauss told him that he needed physical evidence before anything could be done about Jerkins' actions. Supported by dep-

ositions, consideration of these facts in the light most favorable to Bailey casts considerable doubt on whether a reasonable officer could have thought there was probable cause to arrest Bailey. Given the regulation requiring officers to confiscate contraband, the fact that Bailey had the $500 in his pocket does not save these defendants. Therefore, qualified immunity for Garrahan and Strauss is DENIED.

Facts about whether Tileston checked Jerkins' reliability and the results of any check are in dispute. *See* Plaintiff's reply to motion of defendants Hindery and Cole for summary judgment at 11 (entered on docket Sept. 5, 1989) (Doc. 276). In addition, Tileston himself stated that at the time of the arrest he was not certain that Bailey had done anything wrong. Tileston deposition vol. 1, p. 55. These facts are material to the question of whether Tileston reasonably could have believed he had probable cause to conduct the sting and arrest Bailey. Therefore, summary judgment based on qualified immunity for Tileston is DENIED.

There are no allegations that Brown, Allison, Caldwell, Hayes or Cole knew or should have known that Bailey had reported improper contacts by Jerkins. Nothing from the record indicates that they had reason to question Jerkins' reliability, especially in light of their reasonable assumption that Tileston had checked Jerkins' credibility. They should be able to rely on other officers' assessments of probable cause, absent some knowledge of their own sufficient to make them question probable cause. Bailey suggests that these defendants should have known that Jerkins was a hardened criminal, inveterate liar and manipulator whose allegations could not be relied upon to provide probable cause. This assertion, however, is unsupported by allegations of specific instances which would cause the defendants to question Jerkins. Many a case has been won on the testimony of "hardened criminals." Individuals in these defendants' positions rea-

sonably could have relied on their fellow workers' assessments of probable cause. Therefore, summary judgment for Brown, Allison, Caldwell, Cole and Hayes on the issue of qualified immunity regarding the sting and arrest of Bailey is GRANTED.

With regard to Bailey's initial suspension without pay from his job as a corrections officer, qualified immunity is GRANTED to Brown, Allison, Caldwell, Hayes and Cole. They reasonably believed that Bailey's suspension without pay without a pre-deprivation hearing was lawful, considering the seriousness of the charges against him. As mentioned above, they had no reason to question whether probable cause supported the charges. Qualified immunity for Garrahan, Strauss and Tileston is DENIED on the issue of the initial suspension.

Bailey's continued suspension without a hearing is a different matter. Although some delay between the deprivation and the hearing does not necessarily violate due process, Bailey has *never* received a hearing. The law is clear that Bailey was due some process within a reasonable time. Certain facts about who could have granted a hearing are missing from the record and are necessary to determine who, if anyone, is entitled to qualified immunity on this issue. Because material facts are absent regarding Brown, Allison, Caldwell or Hayes (all ACDC employees), summary judgment regarding Bailey's continued suspension without a hearing is DENIED. However, qualified immunity for Cole is GRANTED. As a member of NOCU, Cole was not in a position to provide post-deprivation relief to Bailey.

A similar result is reached regarding damage to Bailey's reputation. Any participation by Strauss or Garrahan in publication to the news media of Bailey's arrest or the allegations against him is not shielded by qualified immunity. As Hayes, Allison, Caldwell, Brown and Cole were not in possession of the same information as Strauss and Garrahan, they are GRANTED qualified im-

munity for any participation in the initial publication to the news media of accusations against Bailey.

The presence of stigmatizing information in Bailey's personnel file also implicates the liberty interest under the due process clause of the fourteenth amendment. *See Buxton v. City of Plant City*, 871 F.2d 1037, 1045 (11th Cir. 1989). Due process requires that Bailey be afforded a "name-clearing hearing" *and* notice of the right to such a hearing. *Id.* at 1046. Although for the purpose of qualified immunity this right as applied to information in a personnel file was not clearly established in this circuit until May 1, 1989, *see Buxton, supra*, the harm is ongoing and Bailey still has not been given a hearing. Therefore, those in charge of Bailey's personnel files and those who could grant a name-clearing hearing to him are not entitled to qualified immunity for their continued failure to provide a hearing. As the record does not clearly indicate who is in charge of Bailey's files and who can grant a hearing, the motion for qualified immunity on this issue is DENIED.

As shown above, Cole is entitled to qualified immunity on all federal causes of action. Therefore, all pendent claims against Cole are DISMISSED WITHOUT PREJUDICE. However, this court would be open to a motion to reconsider the dismissal without prejudice if the statute of limitations has run on the state claims. *See Roper v. Edwards*, 815 F.2d 1474, 1477-78 (11th Cir. 1987).

RESPONDEAT SUPERIOR

Hindery, Alachua County and Gainesville assert that they were not involved in any of the actions which allegedly caused violations of Bailey's civil rights. Thus, they suggest that they are entitled to summary judgment, because respondeat superior is not a viable theory of liability under 42 U.S.C. § 1983. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036 (1978).

Bailey asserts that he does not allege liability on the basis of respondeat superior. Rather, he states that each of these defendants is directly liable for acts pursuant to their policies or customs as those terms have been construed and applied by the Supreme Court in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915 (1988), and *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986).

Case law is clear that vicarious or respondeat superior liability is not available under 42 U.S.C. § 1983. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036. Unless defendants were personally involved in the actions giving rise to a section 1983 claim, they may not be held liable unless they established some practice or policy which made the actions likely to occur. *Id.*

Although liability without personal involvement requires some policy, liability may be imposed for a single decision under appropriate circumstances. *Pembaur*, 475 U.S. at 480, 106 S. Ct. at 1298. Liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483-84, 106 S. Ct. at 1300 (plurality opinion). The authority to make final policy may be legislatively delegated or may be delegated by an official who possesses such authority. Whether an official has final policymaking authority is a question of state law. *Id.*

In this case, *Alachua County* is liable under section 1983 for the actions of Hindery. *See Lucas v. O'Loughlin*, 831 F.2d 232, 235 (11th Cir. 1987), *cert. denied sub nom., St. Johns County v. Lucas*, 108 S. Ct. 1595 (1988) (trial court erred in dismissing county). Thus, Bailey seeks to hold Hindery, Alachua County and Gainesville liable because they delegated policymaking authority to Basil Roundtree, the commanding officer of NOCU, who author-

ized NOCU's involvement in the sting. The question, then, is whether these defendants somehow delegated their authority so as to make Roundtree the official with final policymaking authority regarding which investigations to pursue and the methods used to pursue them.

NOCU was created by the agreement of the Alachua County Sheriff's Office, City of Gainesville Police Department and the University of Florida Police Department. Voluntary Cooperation Agreement (May 22, 1986) (Doc. 159, exhibit 23) [hereinafter VCA]. The agreement provides for a governing board consisting of the Alachua County Sheriff, the Chief of the Gainesville Police Department and the Chief of the University of Florida Police Department, or their designees. VCA para. 5(a). "The Governing Board shall be authorized as necessary with respect to the administration of this agreement to establish policy, promulgate rules and regulations, set guidelines and otherwise provide for the operation of the Combined Narcotics and Organized Crime Unit." VCA para. 5(b). In addition, the Governing Board has "plenary supervisory authority over the personnel participating in this agreement." VCA para. 5(a). Finally, the agreement requires the Governing Board to "appoint a person who shall have the responsibility for the day-to-day command and administration of the Combined Narcotics and Organized Crime Unit activities. Supervisory personnel from the respective participating agencies shall be deployed as directed by said appointee." VCA para. 5(a).

Without a doubt, the three agencies entering the agreement delegated their authority to make final policy to the NOCU Governing Board. Special difficulties arise, however, when it is contended that these policymakers delegated their authority to another official, in this case, Roundtree. It may not be possible to draw an elegant line between final policymakers and others, but the Supreme Court has provided some guidance.

> "When an official's discretionary decisions are constrained by policies not of that official's making,

> those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies."

City of St. Louis v. Praprotnik, 108 S. Ct. 915, 926 (1988) (emphasis in original). In *Praprotnik*, the mayor and aldermen developed policies regarding promotions and transfers of city employees. They also created a municipal Civil Service Commission to review and correct any improper decisions made pursuant to their policy. In fact, the Commission actually reviewed Praprotnik's case. Under this scenario, the Court found that the individuals making the employment decisions were not final policymakers and the municipality was not liable for their actions not in keeping with city policy.

In the current case, the agreement specifically states that the Governing Board makes policy and that a person appointed by the board is responsible for the day-to-day administration of NOCU. At first glance, this seems like the situation in *Praprotnik* in that Roundtree "had the authority to determine how best to *effectuate* a policy announced by his superiors, rather than the power to *establish* that policy." *Id.* at 933 (Brennan, J., concurring) (emphasis in original). Conceivably, the analysis could stop here with the conclusion that the Governing Board, not Roundtree, had policymaking authority.

However, *Praprotnik* recognized that a plaintiff may be able to prove a practice that, although not recognized by written law or express municipal policy, is so widespread and well-settled as to have the force of law. *Praprotnik*, 108 S. Ct. at 926. In that sort of situation, the municipality is held liable for the injuries inflicted pursuant to its "practice." It appears from Roundtree's

testimony that the Governing Board never established policy to guide or constrain Roundtree's discretion.

Roundtree stated that there is no written document which prescribes the parameters of when NOCU could become involved in an investigation. Roundtree, 19. With regard to operations and procedure, Roundtree stated that he and his second-in-command, Lt. Morrow, maintain a NOCU manual which they update by adding or deleting materials as they see fit.

Although the Governing Board theoretically supervises all NOCU personnel, Roundtree did not obtain and did not feel he needed approval from anyone to involve NOCU in an investigation. As commander, he had the authority to make those decisions. Roundtree, 19. Finally, nothing in the record indicates that the Governing Board actually reviewed Roundtree's decisions. Thus, it appears that the Governing Board's practice and custom was to give unfettered discretion, amounting to policymaking authority, to Roundtree.

This case appears similar to the situation in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986). In *Pembaur*, sheriff's deputies were unable to get consent to enter a doctor's office to serve arrest warrants on other individuals. Following standard office procedure, the sheriff's office requested advice from the prosecutor's office and then followed the prosecutor's instructions, axing down the doctor's door. The Court determined that under these circumstances, the authority to make final policy had been delegated to the prosecutor. Thus, the sheriff was liable for the prosecutor's decisions.

In the present case, Roundtree decided when to involve NOCU in investigations and what methods would be used to pursue those investigations. He was the final authority. From the record, it appears that his authority was not circumscribed by the Governing Board's policy or oversight. Thus, Roundtree was the official with au-

thority to make final policy for Hindery, Alachua County and Gainesville regarding NOCU investigations and tactics. Therefore, they are liable for Roundtree's actions under section 1983.

Gainesville admits that it delegated final policymaking authority regarding NOCU to the NOCU Governing Board pursuant to the voluntary cooperation agreement. Gainesville trial brief at 2 (entered on docket Sept. 20, 1989) (Doc. 308). The same analysis that would make Hindery liable for the actions of NOCU applies to Gainesville. See above discussion. Gainesville, however, correctly points out that the voluntary cooperation agreement had expired. Therefore, the city asserts that the delegation of its authority had ended. Gainesville's assertion is without merit.

The Supreme Court has recognized that, although not recognized by written law (or in this case, an existing contract) or express municipal policy, a practice may be so widespread and well settled as to have the force of law. *City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 926 (1988). Although the parties to the cooperation agreement did not renew the agreement when it expired, they continued to operate as though it were still in force. Thus, the city's policies evidenced by the written agreement continued to operate with the force of law after the writing expired.

Gainesville's assertion that it cannot be held responsible for the actions of sheriff's deputies assigned to NOCU is also without merit. The effect of the cooperation agreement is to create a combined law enforcement unit composed of officers from the city, county and university. Once assigned to the unit, the officers are given assignments and act without regard to which entity assigned them to NOCU. Furthermore, NOCU acts equally on behalf of all of the parties to the cooperation agreement. Thus, regardless of who pays NOCU officers, they are all agents for each party to the cooperation agree-

ment; and each party to the agreement is liable for NOCU officers' actions as though they were their own employees.

Bailey also alleges that application of the county's employment policies regarding suspension failed to provide due process when applied to his situation. Bailey's suspension was pursuant to the following policy: "loss of necessary prerequisites or abilities to perform the job (15 calendar days shall be given to regain prerequisites or abilities. If not regained, dismissal is warranted)." Alachua County Personnel Regulations, part VI § 3.1. Alachua County makes no assertions regarding the adequacy of its policy in its motion for summary judgment.

Furthermore, Bailey asserts that once the commissioners had notice of wrongful actions against him, they did nothing to rectify them. Among other things, Bailey asserts that the commissioners' failure to provide a name-clearing hearing or to remove mention of the arrest, suspension and investigation from his personnel file, is a continuing wrong for which the county is directly responsible.

Summary judgment based on respondeat superior is DENIED.

PROBABLE CAUSE

Several defendants assert that they are entitled to summary judgment on the issue of probable cause. Summary judgment on this issue should be denied because material facts are in dispute. *See* Fed. R. Civ. P. 56.

To determine which facts are "material," one must know the standard which will determine the issue. Officers have probable cause to arrest when "the facts and circumstances within the *collective knowledge* of the law enforcement officials, of which they had *reasonably trustworthy information*, are sufficient to cause a person of

reasonable caution to believe that an offense has been or is being committed." *Wilson v. Attaway*, 757 F.2d 1227, 1235 (11th Cir. 1985) (emphasis added) (quoting *United States v. Pantoja-Soto*, 739 F.2d 1520, 1523 (11th Cir. 1984), *cert. denied*, 470 U.S. 1008, 105 S. Ct. 1369 (1985)). In the case at hand, several facts bearing on probable cause are in dispute.

For instance, the time between Bailey's taking the money and his arrest is disputed. Bailey suggests that it was no more than ten or fifteen minutes, during which time he says he tried twice to call his supervisor about the money. Defendants suggest it was over an hour and that Bailey could have contacted his supervisor in that amount of time. If there were regulations requiring confiscation of contraband as Bailey suggests ($500 in considered contraband), then the time lapse would be important in determining whether taking the money provided probable cause to arrest or simply showed that Bailey was following regulations.

Bailey also disputes whether Tileston really checked with other law enforcement officers to determine whether Jerkins was a reliable informant. Two officers who might have been logical choices to check with stated in their depositions that they did not recall Tileston inquiring about Jerkins' credibility.

Finally, Bailey asserts that he told Strauss, Garrahan and Phillips that Jerkins had made improper contact with him on several occasions. The last time Bailey told Strauss was the night of the sting. If proven, it would be difficult to find probable cause in light of the fact that the court must consider "the *collective knowledge* of law enforcement officials" in determining whether probable cause existed. *Wilson*, 757 F.2d at 1235 (emphasis added). Thus, summary judgment on the basis of probable cause is DENIED.

FAILURE TO STATE A CLAIM

Defendants assert that they are entitled to summary judgment because Bailey only alleges negligent deprivation of due process under the fourteenth amendment. Merely negligent failure to provide due process fails to state a claim under 42 U.S.C. § 1983. *See Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986).

The facts alleged in Bailey's first amended complaint indicate that the conduct was something more than negligent, maybe willful. Additionally, Bailey alleges that he was arrested without due process *and* without probable cause. This indicates a substantive claim based on Bailey's fourth amendment right not to be arrested without probable cause. Although mere negligence may not state a claim for relief from due process violations under section 1983, just what mental state is required depends on which right is violated. *Daniels v. Williams*, 106 S. Ct. 662 (1986). As mentioned above, Bailey has provided affidavits supporting alleged facts which, if proven, would show something more than mere negligence.

Several defendants also assert that they did not deprive Bailey of a liberty interest (reputation). However, the fourteenth amendment protects people's liberty interest in their reputations when government actions which stigmatize their reputations are coupled with some other harm. Therefore, a state actor cannot publish false or defamatory statements about people in conjunction with altering a status recognized under state law (such as public employment) without subsequently notifying them that they have the right to a hearing to attempt to clear their names. *See Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155 (1976); *Campbell v. Pierce County*, 741 F.2d 1342, 1345 (11th Cir. 1984), *cert. denied*, 470 U.S. 1052, 105 S. Ct. 1754 (1985).

Finally, Gainesville asserts that section 1983 does not permit claims based on conspiracy. The Eleventh Circuit,

however, does recognize a section 1983 cause of action for conspiracy to commit substantive section 1983 violations. *See Slavin v. Curry*, 574 F.2d 1256, 1261 (5th Cir.), *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978).[1]

Bailey has sufficiently stated his section 1983 claims in Counts 1-3. Therefore, summary judgment for failure to state a claim is DENIED.

LOSS OF CONSORTIUM

Defendants argue that they are entitled to summary judgment on Lizzie Shirley Bailey's claims for loss of consortium. They argue that there is no federal right to consortium, and section 1983 only provides redress for violations of federal rights.

Bailey asserts that state law determines what is a liberty interest entitled to due process before deprivation and that Florida recognizes a liberty interest in consortium. As authority, he cites to *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). *Roth*, however, does not analyze state law to determine *liberty* interests entitled to due process. The Supreme Court in *Roth* stated only that state law determines *property* interests entitled to due process. *Id.* at 572-78; 92 S. Ct. at 2706-10.

Consortium does not exist as a federal right. *Gresham v. Dell*, 630 F. Supp. 1135 (N.D. Ga. 1986). Thus, summary judgment in favor of all defendants on Lizzie Bailey's loss of consortium claims is GRANTED. Lizzie Bailey has no other federal question claim. Accordingly, her pendant state claims are DISMISSED.

SOVEREIGN IMMUNITY

Defendants assert that they are entitled to sovereign immunity for the pendant state claims. As discussed above, sovereign immunity in Florida covers officials of

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[1] This case is binding precedent on the Eleventh Circuit under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

municipalities and local governments. Those officials may be held liable only to the extent that sovereign immunity has been waived. Florida's waiver statute provides:

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort *or named as a party defendant* in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. . . . The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee . . . .

Fla. Stat. § 768.28 (emphasis added).

Bailey asserts that this statute simply requires that the judge enter judgment against *either* the employee *or* the governmental entity. In other words, Bailey asserts that the statute deals exclusively with what remedy is available and does not require a choice until the end of trial. The defendants assert that the statute requires a choice at the beginning of the suit. Plaintiffs must choose early who to sue.

The defendants' argument is supported by the statute itself and Florida case law. The statute provides that no employee "shall be held personally liable in tort *or named as a party defendant.*" Fla. Stat. § 768.28 (emphasis added). If the statute only required a choice of remedies at the end of suit, anyone could be *named.* This statute, however, provides immunity against having to go to trial.

A Florida court reached the same conclusion in *Wilson v. Duval County School Bd.*, 436 So. 2d 261, 263-64 (Fla. 1st Dist. Ct. App. 1983). The court commented that the statute is substantive and regulates *whether*, not when, parties may be joined as defendants. The court found that under the statute "the substantive liability of the school board and its employees is mutually exclusive." *Id.* at 263. The employees may not be sued for negligence, and the governmental entity may not be sued for its employees' malicious or bad faith acts.

In this case, Counts 4-6 allege conduct that was taken "in bad faith, with malicious purpose, in a manner exhibiting wanton and willful disregard of BAILEY's rights." Therefore, immunity for the individual defendants named in these counts is DENIED. Immunity based on this statute is GRANTED to Hindery as sheriff, Alachua County and Gainesville.

Counts 7 and 8 do not allege bad faith conduct. Therefore, immunity based on 768.28 is GRANTED to defendants sued in their individual capacities. Immunity on these counts for Hindery as sheriff, Alachua County and Gainesville is DENIED.

FLORIDA STATUTES § 112.532

The defendants assert that Bailey has attempted to state a cause of action in Counts 7 and 8 based on Florida Statutes § 112.532 and that the attempt must fail. Section 112.532 is often referred to as the Police Officers' Bill of Rights. It provides certain protections to officers under investigation or subject to disciplinary action by their employer. If the officer's employer fails to comply with the Police Officers' Bill of Rights, the officer may apply to the state circuit court for an injunction to restrain and enjoin the violations and to compel performance in keeping with the Officers' Bill of Rights. Fla. Stat. § 112.534.

Defendants correctly point out that section 112.534 is the exclusive remedy for violations of section 112.532. *See City of Miami v. Cosgrove*, 516 So. 2d 1125 (Fla. 3d Dist. Ct. App. 1987). In *Cosgrove*, the officer sued the city for violations of subsections 112.532(4) & (5), which deal with notice of disciplinary action and retaliation for exercise of rights. The court held that the officer's sole remedy was through section 112.534 and, therefore, ordered that the claims for damages pursuant to section 112.532(3) be dismissed.

Florida Statutes section 112.532(3) provides:

> Every law enforcement officer or correctional officer shall have the right to bring civil suit against any person, group of persons, or organization or corporation, or the head of such organization or corporation, for damages, either pecuniary or otherwise, suffered during the performance of the officer's official duties or for abridgment of the officer's civil rights arising out of the officer's performance of official duties.

The Third District Court of Appeal noted that Cosgrove's claim focused on a violation of section 112.532 alone. Therefore, it did not consider whether other remedies were available under other "conceivable but unpleaded theories." *Cosgrove*, 516 So. 2d at 1127 n.1; *see, e.g., Metropolitan Dade County v. Sokolowski*, 439 So. 2d 932 (Fla. 3d Dist. Ct. App. 1983) (action for damages may be proper for constitutional procedural due process violations).

Bailey's first amended complaint alleges violations of his civil rights guaranteed by the constitution and laws of Florida. Thus, to the extent that Bailey seeks damages for violation of his rights under Florida's constitution, summary judgment is DENIED. To the extent that Bailey seeks damages for violations of Florida Statutes section 112.532, summary judgment is GRANTED.

FLORIDA STATUTES § 448.08 ATTORNEY'S FEES

Bailey concedes that he is not entitled to attorney's fees for the pendant state claims, except for those fees spent collecting back wages from the county. Bailey asserts that he is entitled to attorney's fees for collecting back wages pursuant to Florida Statutes section 448.08. Bailey is mistaken. Just because damages may be measured by the amount of lost wages, does not mean that the suit is an action for back wages. To receive attorney's fees pursuant to section 448.08, the suit must be based on the general labor regulations of Chapter 448, Florida Statutes. *Buena Vista Const. v. Carpenters Local Union*, 472 So. 2d 1357, 1358 (Fla. 5th Dist. Ct. App. 1985), *disagreed with by, Fewox v. McMerit Const. Co.*, 556 So. 2d 419 (Fla. 2d Dist. Ct. App. 1989). This suit is not based on Chapter 448. Therefore, Bailey is not entitled to fees under that chapter and all pendant claims for attorney's fees are DISMISSED. *See Fox v. West Palm Beach*, 383 F.2d 189 (5th Cir. 1967) (Florida follows the "American Rule").

FAILURE TO STATE A CLAIM FOR STATE CLAIMS

Defendants seek dismissal of counts alleging malicious prosecution, false arrest and imprisonment, and conspiracy. They suggest that Bailey failed to state claims for relief because he did not make sufficient factual allegations.

The complaint alleges sufficient involvement by each defendant in an arrest without probable cause to state a cause of action. *See Johnson v. Weiner*, 19 So. 2d 699, 700-01 (Fla. 1944). In addition, Bailey has made sufficient factual allegations to make out a prima facie claim for malicious prosecution. *See Burns v. GCC Beverages, Inc.*, 502 So.2d 1217, 1218 (Fla. 1987). As Bailey has sufficiently alleged facts to support the substantive counts, his factual allegations are sufficient to support his con-

spiracy counts. Therefore, defendants' motion to dismiss for failure to state a claim is DENIED.

PUNITIVE DAMAGES

Bailey admits that he is not entitled to punitive damages against the government entities. Therefore, all claims for punitive damages against Gainesville, Sheriff Hindery and Alachua County are DISMISSED.

DONE AND ORDERED this 2nd day of July, 1990.

/s/ Maurice M. Paul
United States District Judge

APPENDIX I

Bailey v. Alachua County, et al.
Case No. GCA-88-10198-MMP (M.D. Fla.)

Strauss, Brown,
Allison, Caldwell
Garrahan and Hayes

Request No. ——

QUALIFIED IMMUNITY

Defendants, Strauss, Brown, Allison, Caldwell, Garrahan and Hayes have been sued in their individual capacities. Under the law, as individuals they are immune from suit for any acts carried out by them within their discretion and within the scope of their responsibilities. The only exception to their immunity from suit is if they took actions which they knew or should have known clearly violated Plaintiff's constitutional rights. If, at the time they acted, it was unclear whether their actions, individually, violated Plaintiff's rights, then they cannot be held liable for those actions.

If you find that Plaintiff's rights were violated in this case, then you must next find whether or not Defendants Strauss, Brown, Allison, Caldwell, Garrahan or Hayes took any action which violated Plaintiff's rights. If you find that they took an action which violated Plaintiff's rights, then you must determine whether Plaintiff's rights were clearly established in law at the time of their violation and specifically that a reasonable person in the position of Defendants Strauss, Brown, Allison, Caldwell, Garrahan or Hayes knew or should have known of this law as it applied to the facts of this case.

Concerning whether Plaintiff's constitutional rights were clearly established at the time they acted, I will advise you as to what the law was and whether it was

clearly established. Your function is to then determine whether Plaintiff has met his burden of proving that these Defendants knew or should have known what Plaintiff's rights were and that their acts violated these rights. If you find that a reasonable person in their position would not have known that the law was clear, or that under the circumstances would not have known that their acts violated Plaintiff's constitutional rights, then you must find that they are immune from this suit.

Harlow v. Fitzgerald, 457 U.S. 800 (1982);
Davis v. Scherer, 68 U.S. 183 (1984);
Mitchell v. Forsyth, 472 U.S. 511 (1985);
Rich v. Dollar, 841 F.2d 1558 (11th Cir. 1988);
Zeigler v. Jackson, 716 F.2d 847 (11th Cir. 1983)

Granted ——

Denied ——

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

(2)

No. 91-2077

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COLLEEN HAYES, NATHANIEL CALDWELL and
TOM ALLISON,

Petitioners,

vs.

GREGG FITZGERALD BAILEY and
LIZZIE SHIRLEY BAILEY,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH W. LITTLE
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Gainesville, FL 32605

Attorney For Respondents

July 10, 1992

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July 10, 1992

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FAILED TO APPLY THE CORRECT STANDARD IN DETERMINING WHETHER THE DEFENSE OF QUALIFIED IMMUNITY WAS PROPERLY DENIED TO PUBLIC OFFICIALS IN CONNECTION WITH AN ALLEGED DENIAL OF PROCEDURAL DUE PROCESS.

II. WHETHER A PUBLIC OFFICIAL'S DEFENSE OF QUALIFIED IMMUNITY SHOULD BE SUBMITTED TO A JURY WHEN IT CANNOT BE RESOLVED BEFOREHAND BY A MOTION FOR SUMMARY JUDGMENT BECAUSE OF DISPUTED MATERIAL FACTS.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below included the Board of County Commissioners of Alachua County, Florida, Eugene Whitworth, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities, L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities, City of Gainesville, Florida, John Stanton Tileston, Sr., Farnell Cole, Charles Jerkins, Spencer Mann, Stephen Garrahan, Gary Brown and James Strauss.

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IN THE
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Petitioners,

vs.

GREGG FITZGERALD BAILEY and LIZZIE SHIRLEY BAILEY,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondents Gregg Fitzgerald Bailey and Lizzie Shirley Bailey respectfully pray that this Court deny the Petition For Writ of Certiorari to review the questions Petitioners seek to have reviewed from the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 956 F.2d 1112. This

opinion is reproduced in Petitioners' Petition, and in Respondents' related Petition For Writ Of Certiorari, No. 92-3. There was no reported opinion of the United States District Court for the Northern District of Florida; its unreported pretrial order ruling on various pretrial motions is reproduced in Petitioners' Petition and in Respondents' related Petition For Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1992. A timely Petition For Rehearing was denied on June 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section I of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property without due process of law."

The Civil Rights Act of 1871, 42

U.S.C. §1983 (1982), states in pertinent part:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners' summary statement of the case omits the factual background that underlies the rulings of the Courts below on the issues raised in Petitioners' Petition and deprives it of validity. Respondents have set forth the detailed facts in their Petition For Writ Of Certiorari (No. 92-3) and will summarize them here.

Respondent GREGG F. BAILEY (hereinafter referred to as BAILEY) was in

the employment of the Alachua County, Florida, Department of Corrections (hereinafter referred to as ACDC) as a corrections officer on the morning of May 14, 1987. BAILEY was a permanent employee with constitutionally protected property interests in his job.

Petitioner CALDWELL was ACDC Director on that date and later became County Director of Public Safety with supervisory authority over the ACDC Acting Director. Petitioner ALLISON was ACDC Assistant Director on May 14, 1987 (Assistant to CALDWELL) and later became ACDC Acting Director under CALDWELL's supervising authority as Public Safety Director. At all times HAYES was County Personnel Manager. ALLISON testified that he took every job action taken as ACDC assistant or acting Director in respect to BAILEY after prior consultation with and approval of CALDWELL and HAYES.

On April 22, 1987 a jail break was attempted at ACDC and failed. ACDC officials immediately determined who was involved and brought charges against the perpetrators. BAILEY was not implicated. After this, one of the inmates who attempted the escape in connection with his requests for favorable treatment from ACDC authorities, made vague statements that a prison guard might have been involved in the escape. Respondent BAILEY was his targeted victim.

Over a several day period numerous ACDC officials and officials from other agencies set up, approved or agreed to a plan to trap BAILEY in an incriminating act by having the inmate in question hand him $500 in cash. BAILEY was supposed to take the money as proof that he participated in the escape attempt. (The Defendants ignored the fact that BAILEY was required by Florida law, ACDC

regulations and training to seize the money which was illegal contraband in the inmate's possession.) ALLISON's office was established as the headquarters of this operation, and CALDWELL and HAYES approved the activities.

BAILEY seized the money and within 4 to 9 minutes was arrested at about 6:30 A.M. on the morning of May 14, 1987. Although knowledge of this point is not essential to this particular petition, BAILEY was never prosecuted on the charges upon which he was arrested (i.e. aiding jail break) and all charges against him were ultimately dropped. From the beginning BAILEY maintained innocence.

The foregoing records show that what happened to BAILEY, including all the wrongful personnel actions, were deliberately planned and did not occur spontaneously. As a part of the plan ALLISON, with CALDWELL's and HAYES'

approval, wrote BAILEY a letter dated May 13, 1987 (the day before the arrest) stating that BAILEY was suspended without pay as of 7:00 A.M. on May 14, 1987 and informing him that he had 15 days to restore the "prerequisites" of his office. This letter was hand delivered to BAILEY on the morning of May 14, 1987 shortly after he was arrested. Alachua County stopped BAILEY's pay as of 7:00 A.M., May 14, 1987 and he has never again been paid beginning with that date. Nor has BAILEY ever had notice or a hearing pertaining to these matters, except in this and related litigation.

On May 26, 198, ALLISON without prior notice to BAILEY or a hearing wrote BAILEY a second letter stating "effective today you are placed on suspension without pay until further notice." (e.s.) CALDWELL and HAYES approved this letter.

All criminal charges against BAILEY

were dropped on November 19, 1987. By letter of that date, BAILEY wrote CALDWELL and asked to be reinstated with back pay, or for a hearing if his request was denied, or for information about how to make a request for hearing if he wasn't doing it correctly. CALDWELL did not reply, but gave BAILEY's letter to ALLISON. On December 7, 1987, ALLISON wrote BAILEY denying his requests for reinstatement and hearing. CALDWELL and HAYES approved this letter. More than seven months later, BAILEY was finally ordered back to work on June 21, 1988. In the meantime BAILEY had sought psychiatric treatment for severe psychiatric damage the acts of various Defendants had caused, and he was unable to and has never been able to return to regular duty because of these severe psychiatric injuries. His treatment included an extended stay in a secured psychiatric unit of the University

of Florida Shands Teaching Hospital in the summer of 1988. The unrefuted evidence is that these injuries were caused by the various acts Petitioners and other Defendants took against him.

BAILEY brought a 42 U.S.C. §1983 action against Petitioners and other Defendants. Against Petitioners, BAILEY claimed, in part, a deprivation of property interests without due process of law as to suspensions without pay and without notice and hearing, first on May 14, then May 26, and again on December 7, and, also claimed constitutional deprivations for failing to provide post-deprivation due process at any time. The District Court dismissed all claims against Petitioners based upon deprivation of property without due process as of the initial peremptory suspension without pay on the morning of May 14, 1987. Claims pertaining to that decision are not an

issue in Petitioners' petition, but are raised in BAILEY's related petition, No. 92-3.

The District Court also dismissed all claims against Petitioner Allison on the grounds of qualified immunity for actions he took after May 14, 1987. (The Court of Appeals reversed that ruling and ALLISON is now a Petitioner on that issue along with CALDWELL and HAYES). During trial CALDWELL and HAYES moved for directed verdicts as to the property deprivation claims against them for actions taken by them after May 14, 1987. This motion was argued extensively after the close of evidence on the seventeenth day of trial (R 40-577, pp. 2-58). The District Court reserved all pending motions and proceeded to conduct a charge conference to discuss a packet of jury instructions that the Court had proposed (R 40-577, 58). This packet included an instruction on

qualified immunity. (Attached as Appendix A. Because this instruction was not given, it is apparently not in the record.) BAILEY objected to the instruction (R 40-577-67), and the District Court thereafter withdrew it stating:

> THE COURT: I'll tell you what. I'm going to take it out. That's part of the thing that I've wrestled with this whole trial. I think really it's probably a matter of law for me to decide, as I've done, and I'm just not ready to make that decision; I can't. We'll address them again. If you get an adverse verdict and if you want to, we'll address this again. But you're going to object?
>
> [Objections made]
>
> THE COURT: Seventeen (i.e., qualified immunity] is out.

(e.s.) Thereafter the District Court instructed the jury on the substantive elements of 42 U.S.C. §1983 liability (R 42-578-pp. 13-17, attached as Appendix B), and submitted to the jury the question of whether CALDWELL and HAYES deprived BAILEY

of property interests in his public employment by not giving him hearings he was entitled to and for continuing to deprive him of his job, his back pay and benefits without authority after all the criminal charges against him had been dismissed (R 45-578, pp. 24, 25).

To that question the jury returned the answer, "Yes." Thereafter, on August 16, 1990, CALDWELL and HAYES each filed renewed Motions Of Directed Verdict Or For Judgment Notwithstanding The Verdict Or Alternatively For New Trial. Petitioners CALDWELL and HAYES again asserted, in part, that the law was not clearly established during the period May 14, 1987 through June 20, 1988 that BAILEY had a right to notice and hearing if he was to be suspended without pay indefinitely. Petitioners presented memoranda re-arguing the issue extensively and BAILEY resisted the motions with arguments.

On March 4, 1991, the District Court denied Petitioners' motions for post-verdict relief on qualified immunity grounds (Appendix C), thereby confirming his earlier ruling that qualified immunity was a question of law and confirming his ruling on that question against these Petitioners. In short, the District Court ruled as, a matter of law, that at all times in question commencing after the initial peremptory suspension of May 14, 1987 the law was clearly established that Petitioners could not suspend BAILEY without pay indefinitely without notice and hearing in the circumstances of this case, which were fully known to the District Court.

In regard to the precise qualified immunity issue Petitioners now raise in this Court, Petitioners appealed the District Court's ruling to the Circuit Court below and raised the issue as stated

and argued in their initial brief as follows:

> 2. As a matter of law, the District Court erred by not granting qualified immunity to CALDWELL and HAYES with respect to the seven month period between the withdrawal of criminal charges and BAILEY's reinstatement.

Brief of Appellees/Cross Appellants NATE CALDWELL and COLLEEN HAYES, pp. vi, 26-32, No. 91-3275, In the United States Court of Appeals for Eleventh Circuit.

In the meantime BAILEY had appealed to the Eleventh Circuit asserting that the District Court had erred to dismiss the due process claims against Petitioners for having preemptorily deprived him of his public employment without notice and hearing and without pay on the morning of May 14, 1987. The Court below denied BAILEY's appeal on this point, 956 F.2d at 1123, and BAILEY has filed a Petition For Writ of Certiorari in this Court, seeking further review. (No. 92-3).

The Court below also denied Petitioners' appeal on the issue they raise here, stating:

> Although the District Court did not explicitly[1] rule on CALDWELL and HAYES' qualified immunity defense, we interpret the District Court's actions as rejecting that defense. Furthermore, we agree that CALDWELL and HAYES are not entitled to qualified immunity for BAILEY's post-deprivation procedural due process claims.

REASONS FOR DENYING THE WRIT

QUESTION I. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT APPLIED THE CORRECT STANDARD IN DETERMINING WHETHER THE DEFENSE OF QUALIFIED IMMUNITY WAS PROPERLY DENIED TO PUBLIC OFFICIALS IN CONNECTION WITH AN ALLEGED DENIAL OF PROCEDURAL DUE PROCESS.

Petitioners began their argument with a factual statement that BAILEY perceives

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[1] BAILEY contends that the Court below mispoke when it stated the District Court did not explicitly rule. The Order of March 4, '1991 is an explicit denial. It is true that the District Court gave no reasons in that summary order, but the record is replete with citations of authority and argument that establish that the law was clearly established that BAILEY might not be indefinitely suspended without pay and without notice and hearing on May 14, 1987 and thereafter.

to be a flagrant misstatement of the opinion and holding of the Court below. Specifically, Petitioners state:

> The Eleventh Circuit refused to decide the threshold legal question required by the Supreme Court to be decided in every qualified immunity case: Was the law "clearly established"? Instead, the Eleventh Circuit in this case relegated that legal question to the jury. Precisely the issue that the Court itself must decide in this case -- what process was meaningful and when it was due was dodged by the Eleventh Circuit and erroneously sent back to the jury.

Petitioners' Petition, No. 91-2077, pp. 7,8.

As the Statement of the Case, above, demonstrates, both the District Court and the Court below decided the qualified immunity issue against Petitioners as a matter of law. In brief review: at the charge conference the District Court stated that he deemed the issue to be one of law and that he had decided it against Petitioners. Accordingly, the District

Court withdrew the qualified immunity jury instruction and, thereafter, instructed the jury only on liability questions and not on qualified immunity. The jury returned a verdict against Petitioners on liability (i.e. Petitioners did deprive BAILEY of property without due process of law). Petitioners then moved for judgment notwithstanding the verdict on the ground that they were entitled to qualified immunity as a matter of law. The District Court denied that motion and Petitioners then appealed to the Court below on the ground that they were entitled to qualified immunity as a matter of law. Finally, the Court below denied that precise appeal.

Hence, contrary to Petitioners' statement, the Eleventh Circuit did decide the threshold issue as a matter of law and did not relegate the qualified immunity issue to the jury. Consequently, the

issue Petitioners attempt to have this Court review is not raised by the proceedings below and, consequently, is not a proper subject of review. For that reason alone, this Court should deny the Petition as to Question 1.

It is true that the Court below did remand the case for retrial on the question of liability: that is, the Jury must consider again whether the actions of CALDWELL and HAYES caused BAILEY to be deprived of property interests without due process of law. Nevertheless, the Circuit Court required the retrial, not because of qualified immunity, but because of the improper seating of a juror. (See Petition No. 92-3). In short, it is what Petitioners did, when they did it, and whether what they did unconstitutionally deprived BAILEY of property interests that the jury must decide anew. The Courts below settled <u>as a matter of law</u> that if

Petitioners in fact acted wrongfully, then qualified immunity does not shield them from liability.

Furthermore, in challenging qualified immunity as applied by the Court below, Petitioners failed to explain in their Petition that the Circuit Court's opinion was divided into two main sections, (A) BAILEY's Appeal; 956 F.2d 1119-1125, and (B) CALDWELL and HAYES' Appeal, 956 F.2d 1125-1127. The Court below explained the standard for qualified immunity under its discussion of BAILEY's Appeal and understandably did not repeat that explanation in the portion of the opinion pertaining to Petitioner's appeal. In discussing BAILEY's appeal, the Court stated:

> To defeat a qualified immunity defense, BAILEY was required to show that the Defendants violated a clearly established statutory or constitutional right of which a reasonable person would have known. [citations omitted]. In deciding whether a constitutional right

> is clearly established, we must judge the contours of the law at the time the employment decision was being made, irrespective of subsequent developments in the law. Thus, public officials are charged with keeping abreast of the current state of the law, not anticipating changes. Whether the law is "clearly established" is a question of law under review de novo.

956 F.2d at 1123. Having stated the qualified immunity standard in BAILEY's appeal, the Court below turned its attention to CALDWELL and HAYES' appeal in Part B and, without restating the standard of review, concluded, "Furthermore, we agree that CALDWELL and HAYES are not entitled to qualified immunity for BAILEY's post-deprivation procedural due process claims." 956 F.2d at 1126.

Petitioners are disingenuous to suggest that the Court below applied one legal standard to the qualified immunity issue in BAILEY's appeal and then applied a drastically different standard a few pages later in CALDWELL and HAYES' appeal.

What it is not disingenuous to suggest is that the Court below perceived that the law was so well settled on May 14, 1987 and thereafter that BAILEY might not be indefinitely deprived of his property interests in his job without pay and without notice and hearing, that it did not deem the matter worthy of extended discussion.

For these reasons, the Petition should be denied.

QUESTION II. THIS CASE RAISES NO ISSUE OF WHETHER A PUBLIC OFFICIAL'S DEFENSE OF QUALIFIED IMMUNITY SHOULD BE SUBMITTED TO A JURY WHEN IT CANNOT BE RESOLVED BEFOREHAND BY A MOTION FOR SUMMARY JUDGMENT BECAUSE OF DISPUTED FACTS.

This Court should deny the Petition For a Writ to review Question 2 because the facts and proceedings in this case do not raise the issue presented in the question. (Indeed, the Petition plainly attempts to employ this case as a vehicle to obtain this Court's review of the Eleventh Circuit's decision in Ansley v.

Henrich, 925 F.2d 1339 (11th Cir. 1991).) (See Petition, pp. 14-19.) First, this case presented no undisputed facts pertaining to the qualified immunity issue; and, second, the law is settled that the issue of qualified immunity is a question of law and not a question of fact to be submitted to the jury under the test of reasonableness as requested by Petitioners in this case. (See Petitioners' requested jury instructions, Petition No. 91-2077, pp. 81a, 82.)

First, there were no disputed facts pertaining to the qualified immunity issue. It is undisputed that BAILEY was a permanent public employee at all times in question. Moreover, the law was well settled by numerous decisions issued by this Court long before May 14, 1987 that permanent public employees, such as BAILEY, possess property interests in their jobs. It was equally well settled

that these property interests may not constitutionally be deprived without due process of law, which requires as a minimum notice and an opportunity to be heard. See, e.g., Board of Regents v. Roth, 408 U.S. 364 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972). Moreover, in 1985, two years before these events, this Court gave specific guidance to officials such as Petitioners as to how to proceed when exigent circumstances required quick decisions; namely, "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." (e.s.) Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545 (1985). In fact, however, there were no pressing or unanticipated circumstances in this case, and none requiring quick action. As the facts presented in the Statement Of The

Case demonstrate, every action Petitioners took (including the initial May 14, 1987 suspension without pay) was deliberately planned and executed.

Moreover, there is no dispute that Petitioners peremptorily suspended BAILEY without pay and without notice or hearing on three separate occasions: May 14, 1987, May 26, 1987, and December 7, 1987. It is also undisputed that Petitioners never at any time gave BAILEY notice and hearing and have never paid him since 7:00 A.M., May 14, 1987. In sum, this case involved no disputed facts that needed to be settled before the District Court decided as a matter of law that the law pertaining to what process is due before depriving public employees of their jobs was well settled at all these times and that reasonable officials in Petitioners' places and under these circumstances knew or should have known their actions

violated BAILEY's clearly established rights. For this reason, the Petition to issue a writ to review Question 2 should be denied.

In a second argument, Petitioners request this Court to accept review of this case to decide whether or not governmental officials are, in effect, to be given two bites at the qualified immunity apple. Petitioners seek a rule that, first, the District Court must decide whether the rights in question were clearly established at the time in the circumstances, and, if they were, then to resubmit to the jury the question of whether Defendant officials acted reasonably under the circumstances in violating the clearly established rights. Petitioners express their view as follows:

> In other words if there could have been a finding that these public officials, in the light of the information they possessed at the time, could reasonably have believed that their failing to provide BAILEY

> with a hearing was not unlawful, then the officials would have been immune from liability.

Petition No. 91-2077, p.15. See also Petitioners' proposed jury instructions, Petition No. 91-2077, pp. 81a, 82a.

This assertion is of itself merely an unexceptional paraphrase of the seminal holding in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), wherein this Court laid down the prevailing objective standard of qualified immunity, as follows:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

102 S.Ct. at 2738. See also Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). In applying the standard of objective reasonableness in Anderson v. Creighton, this Court made

plain that an official need not necessarily be right to be immune, 102 S.Ct. at 3042, and that the evaluation of whether a claimed right was clearly established must consider the factual context in which a right is claimed. 107 S.Ct. at 3040. As elaborated in Hunter v. Bryant, __U.S.__, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), "the Court should ask whether the agents acted reasonably under settled law in the circumstances," 112 S.Ct. at 537 (e.s.). Furthermore, this Court has repeatedly stated that the entire evaluation is a purely legal question, Siegert v. Gilley, __U.S.__ 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991) and, that it should be decided by a court (long before trial if possible) and not by a jury. Hunter v. Bryant, __U.S.__, 112 S.Ct. 534, 537, 116, L.Ed. 589 (1991).

In the context of this case, what Petitioners ask this Court to do is to

prescribe a rule of law that permits juries to override the legal decisions of the District Courts on the question of whether the "agents acted reasonably under settled law in the circumstances" of the particular case, Hunter v. Bryant, with a subsequent supervening second determination of the exact same issue. In other words, Petitioners advance a rule that would permit a jury to determine that the District Court's determination that a reasonable defendant in the particular circumstances should have known that its acts would violate clearly established rights was itself an unreasonable determination. This proposition is antithetical to this Court's precedents on qualified immunity and to any basic notice of fair play. Petitioners wish to submerge the fact that the fundamental purpose of 42 U.S.C. §1983 actions is to vindicate the constitutional rights of

citizens injured by wrongful acts of public officers and employees. The basic question is whether the charged agents caused the Plaintiff to be deprived of constitutional rights. Although this Court has judicially acknowledged immunities to protect erring officials whose conduct in the circumstances satisfies the objective reasonableness standard, it has done so because the public interest requires it, and not because erring officials have some sort of overarching individual right not to be held liable that prevails over the constitutional rights of injured citizens.

BAILEY respectfully asserts that one bite at the qualified immunity apple is enough. On that one bite, the courts below applied this Court's precedents properly and decided as a matter of law that Petitioners did not act reasonably <u>in the circumstances</u> in the light of clearly

settled law. For this reason, this Court should deny the Petition.

Finally, BAILEY acknowledges that cases may arise in which a District Court cannot determine the true state of facts that constitutes "the circumstances." For example, if at summary judgment in a police shooting case, the Plaintiff presents an affidavit that he was lying spread eagle supine on the ground with empty hands in broad daylight when the officer stood over him and shot him in the chest, and the Defendant officer presents an affidavit that the Plaintiff was standing in a crouch in subdued light and shooting a revolver straight at him, the District Court will be unable to decide the qualified immunity question at that point. If the true facts are as Plaintiff states them, the Defendant is not immune; if they are as the Defendant states them, immunity should be granted.

BAILEY readily agrees that a factual dispute such as the foregoing hypothetical would require a jury determination of the true facts before the Court could decide the qualified immunity question in the true circumstances.[2] In such a case, the District Court would be required to decide whether to employ special interrogatories, special verdicts, or some other approved technique to obtain the jury's verdict as to what are the true specific contextual facts. Such a case may also present an occasion for this Court to decide whether one approach is to be used to the exclusion of others. This case, however, presents no such occasion because no dispute exists as to the true contextual

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[2] BAILEY strongly rebukes Petitioners' suggestion that a Defendant should always win as a matter of law whenever the true facts about the circumstances are in dispute. See Petitioners' Petition No. 91-2077, p. 13, footnote. Such a rule elevates official immunity to a status far superior to constitutional rights. It would also mean that an official could always assure immunity by lying about the true facts.

facts. For this reason, the Petition should be denied.

CONCLUSION

The Courts below were cognizant of and applied the correct principles of qualified immunity to the procedural due process violations BAILEY claims Petitioners committed against him during the thirteen months following the initial peremptory suspension without pay, notice and hearing that occurred on May 14, 1987. Contrary to Petitioners' assertions in Question 1, the Courts below did not submit the issue of qualified immunity for jury determination in the trial that has been held, nor did the Circuit Court instruct the District Court to submit the issue to jury determination in the retrial on remand. Instead, the Court below affirmed the District Court's ruling that, as a matter of law, Petitioners were not entitled to qualified immunity under

settled law in the circumstances of this case. For these reasons, this Court should deny the Petition For a Writ to review Question 1.

In Question 2, Petitioners assert, in effect, that once a District Court decides, under settled law and in the circumstances of the case, that the actions of the Defendants were not entitled to qualified immunity because their actions did not satisfy the objective reasonableness standard, the Court must thereafter resubmit the same issue to a jury to reconsider the reasonableness in the circumstances issue. This point is thoroughly repudiated by stable precedents of this Court. Accordingly, this Court should deny the writ.

In Question 2, Petitioners also assert that this Court should issue a writ to consider how District Courts should

employ juries to ascertain the true facts when disputes exist as to what were the true contextual circumstances actually confronting the parties. As BAILEY has shown, no facts pertaining to the circumstances are in dispute in this case. Consequently, this case does not present a proper occasion to review the issue and, accordingly, this Court should deny the Petition.

Respectfully submitted,

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APPENDIX A

DISTRICT COURT'S EXCLUDED QUALIFIED IMMUNITY JURY INSTRUCTION

Under the doctrine of "qualified immunity," government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The standard is an objective one, and therefore does not include an inquiry into the officer's subjective intent or beliefs. In sum, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

The test for qualified immunity is as

follows:

1. The defendant government official must first prove, by a preponderance of the evidence, that he or she was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.

2. Once the defendant government official proves that he or she was acting within the scope of his or her discretionary authority, the burden shifts to the plaintiff to show lack of good faith on the defendant's part. Plaintiff's burden is met by proof demonstrating that the defendant public official's actions violated clearly established constitutional law.

APPENDIX B

EXCERPTS FROM JURY INSTRUCTIONS GIVEN BY DISTRICT COURT

Now in order to prove a violation of 42 United States Code, Section 1983, the Plaintiff must prove by a preponderance of the evidence each of the following facts; first, that the Defendants intentionally committed acts which violated one or more of the Plaintiff's Federal constitutional rights which I have previously mentioned to you; second, that in so doing, the Defendants acted under color of the authority of the State of Florida; and third, that the Defendants' acts were the approximate or the legal cause of the damages sustained by the Plaintiff.

A state or local official acts under color of the authority of the state, not only when he acts within the limits of his lawful authority, but also when he acts without or beyond the bounds of his lawful authority, in order for unlawful acts of an official to be done under color of state law; however, the unlawful act must

be done while the official is purporting to act in the performance of his official duty, that is, the unlawful act must be an abuse or misuse of power which is possessed by the official only because he is an official.

Not to be deprived of a property or liberty interest without due process of law means to be deprived of a property or liberty interest without authority under the law. And before you can decide then whether or not Plaintiff was deprived by a Defendant of a property or liberty interest without due process of law, you must first decide from a preponderance of the evidence, whether the Defendant committed the act claimed by the Plaintiff, and if so, whether the Defendant was acting within or beyond the bounds of his or her lawful authority under state law.

Now if the defendant acted within the

limits of his or her lawful authority under state law, then the Defendant could not have deprived Plaintiff of any right without due process of law. Now a county government may only be held liable for deprivation of constitutional rights which are the results of unconstitutional governmental policies. Since governmental bodies can act only through natural persons, the county government may be held liable when an only when its official policies cause its employees to violate another person's constitutional rights. It is for you, the jury, to determine whether their decisions have caused the deprivation of rights and issues by policies that command that deprivation occurred.

Now you are further instructed that in determining whether any Defendant is liable under Title 42 United States Code, Section 1983, for depriving the Plaintiff

of a constitutional right you are to consider only the action or inaction of each named Defendant and not that of any other person concerning whom you may have heard testimony. Each Defendant is liable only for his or her actions or for those of other persons that he or she personally directly approved or in whose conduct he or she knowingly acquiesced.

Personal involvement of supervisory officials is a touchstone of their liability. They are not liable for civil rights violations, simply because of the actions of their support. Thus, to meet his burden of proof of personal involvement by these Defendants, Plaintiff must prove as to each, not only that his rights or rights as set forth above are violated, but also that the injuries resulted from such violation or violations were caused personally by that Defendant or at his or her personal direction or

that he or she knowingly acquiesced in acting, causing that injury.

Personal participation in the immediate act is not required. It is sufficient if the Defendant intentionally set in motion or knowingly refused to terminate a series of acts by others which he knew or reasonably should have known would cause the proscribed injury to the Plaintiff. Now if any injury or damage is legally caused by an act or a failure to act, whenever it appears from the evidence in the case that the act or the omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or the omission. Now if you should find in favor of the Defendants of each and every claim, you need not consider damages. If on the other hand, you should find that Plaintiff

has proven each essential element of any given claim, then you must determine what damages, if any, are owed to the Plaintiff because of that Defendant's constitutional violation.

APPENDIX C

DISTRICT COURT ORDER
OF MARCH 4, 1990
DENYING PETITIONERS MOTIONS
FOR POST-VERDICT RELIEF

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and
LIZZIE SHIRLEY BAILEY,

v.

BOARD OF COUNTY COMMISSIONERS OF
ALACHUA COUNTY, FLORIDA, et al.,

Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF
ALACHUA COUNTY, FLORIDA, et al.,

Defendants

ORDER

[Filed Mar. 4, 1991]

This cause is before the court on various outstanding motions. Plaintiff's motion for Judgment Notwithstanding the Verdict (Doc. 482) is DENIED; Defendant Caldwell's renewed motion for Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial (Doc. 485), is DENIED; Defendant Hayes' renewed motion for Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial (Doc. 487). is DENIED. The following motions will be ruled on by separate order:

(1) City's motion for attorneys' fees (Doc. 505).

(2) City's motion for costs (Doc. 506).
(3) Plaintiff's motion to strike City's motion for costs (Doc. 521).
(4) County's motion to tax costs (Doc. 523).
(5) Joinder of defendant's Garrahan, Brown, Strauss and Allison in County's motion to tax costs (Doc. 522).
(6) Motion to tax costs by defendants Hindery and Cole (Doc. 524).
(7) Defendant Tileston's motion for costs (Doc. 527).
(8) Plaintiff's motion to strike Tileston's motion for costs (Doc. 543).
(9) City's motion to require plaintiffs to post bond (Doc. 545).

DONE AND ORDERED this 1st day of March, 1991.

/s/ Maurice M. Paul
United States District Judge

No. 92-3
No. 91-2077

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

GREGG FITZGERALD BAILEY,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, NATE CALDWELL, COLLEEN HAYES, TOM L. ALLISON, STEPHEN GARRAHAN, JAMES STRAUSS AND GARY BROWN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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July 27, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the District Court's directed verdict dismissing all arrest-related claims because probable cause to arrest Bailey existed.

2. Whether the Court of Appeals correctly affirmed the District Court's final judgment based on the jury's verdict dismissing all claims against Alachua County because there was no finding of an official policy or custom which could result in any deprivation of Bailey's rights.

3. Whether the Court of Appeals correctly affirmed the District Court's orders granting Respondents qualified immunity with respect to Bailey's pre-deprivation procedural due process claims.

4. Whether the Court of Appeals correctly found no fair support in the record for the District Court's conclusion that a juror would be impartial even though doubts of bias existed.

5. Should certiorari be granted, Respondents would present two additional questions. These are stated in Respondents' Petition for a Writ of Certiorari filed sub nom. *Hayes, et al. v. Bailey*, No. 91-2077.

PARTIES BELOW

In addition to the parties named in the caption, the parties to the proceedings below were Eugene T. Whitworth, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities; L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities; City of Gainesville, Florida; John Stanton Tileston, Sr.; Charles Jerkins; and Spencer Mann.

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No. 92-3
No. 91-2077

In The

Supreme Court of the United States

October Term, 1992

GREGG FITZGERALD BAILEY,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, NATE CALDWELL, COLLEEN HAYES, TOM L. ALLISON, STEPHEN GARRAHAN, JAMES STRAUSS AND GARY BROWN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Board of County Commissioners of Alachua County, Nate Caldwell, Colleen Hayes, Tom Allison, Stephen Garrahan, James Strauss and Gary Brown respectfully request that the Court deny Gregg Fitzgerald Bailey's Petition for a Writ of Certiorari seeking review of certain aspects of the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992.

COUNTERSTATEMENT OF THE CASE

A. The Matter In The Courts Below

In this action, filed by Gregg Bailey ("Bailey") and his wife in the District Court for the Northern District of Florida, pursuant to 42 U.S.C. § 1983 ("Section 1983") and state law, Bailey complained that he had been denied due process in connection with his arrest and suspension from his employment as a corrections officer with the Alachua County Corrections Department. All defendants moved to dismiss or for summary judgment. On July 2, 1990, the District Court entered an order granting those motions as to many of the defendants in whole or in part. (Petitioner's Appendix at 1b-51b)

At the beginning of the five-week trial on Bailey's remaining claims, on July 9, 1990, the District Court granted Respondent Allison summary judgment and dismissed him from the action. At the close of all the evidence, the court directed verdicts for a number of defendants, including Respondents Garrahan, Strauss and Brown, on the ground that the arresting officer, Tileston, had probable cause to arrest Bailey. The claims which remained were employment procedural due process claims against Respondents Alachua County, Hayes and Caldwell. Those claims were submitted to the jury which returned a verdict in favor of the County and against Hayes and Caldwell.

Bailey appealed to the Eleventh Circuit Court of Appeals the District Court's judgments in favor of the majority of the defendants. Caldwell and Hayes cross-appealed. The decision of the Court of Appeals was entered on March 31, 1992, upholding the District Court's

judgment with respect to all defendants except Allison, Caldwell and Hayes. The Court of Appeals reversed the District Court's granting of qualified immunity to Allison and affirmed its denial of qualified immunity to Caldwell and Hayes with respect to certain post-deprivation procedural due process claims. The Court of Appeals remanded the case for a new trial of Allison, Caldwell and Hayes.

On June 1, 1992, the Court of Appeals denied Bailey's suggestion for rehearing en banc. (Petitioner's Appendix 1c-2c) On June 4, 1992, Hayes and Caldwell filed with the Court of Appeals their motion for stay of the mandate pending consideration by this Court of their Petition for a Writ of Certiorari. On June 26, 1992, Hayes, Caldwell and Allison filed their Petition with this Court, requesting that the Supreme Court consider two questions on the issue of qualified immunity. That Petition is styled *Hayes, et al. v. Bailey*, No. 91-2077. On June 29, 1992, Bailey filed this Petition.

B. Counterstatement of the Facts

In summarizing the facts for review, Petitioner apparently does not contend that the courts below erroneously relied on any disputed facts. Rather, Petitioner simply states his version of the facts and bases his arguments for granting the Petition on them.[1] However, the material

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[1] In Petitioner's statement of the case, he refers to many alleged undisputed facts without record citation. Pursuant to

(Continued on following page)

facts, as relied on by the Court of Appeals, and supplemented by the District Court record, are as follows.

Bailey, a former corrections officer at the Alachua County Department of Corrections (ACDC), developed a relationship with an inmate, Charles Jerkins. The relationship dated from December 1986 when Bailey was assigned to guard Jerkins in the hospital. On April 22, 1987, several inmates attempted to escape from ACDC by sawing a window with hacksaw blades. (Petitioner's Appendix at 4a-6a) The attempt was foiled.

Prior to the escape attempt, Bailey had written a letter, dated February 1, 1987, to ACDC Chief of Security Garrahan, in which Bailey made vague references to illegal inmate activities. Bailey made no reference to Jerkins in the letter. Major Garrahan asked the appropriate shift lieutenant, James Strauss, to handle the matter. (Petitioner's Appendix at 28a) Strauss was of the view that Bailey was being approached by inmates just as others often were and he did not take seriously Bailey's professed concerns. (R35-567-36 to 40,105 to 107) Bailey never filled out an incident report with specific information. (R24-572-207,208) (R35-567-40)

(Continued from previous page)

Supreme Court Rule 15, Respondents note throughout this brief those facts which are material, with citation to the Eleventh Circuit's reliance on those facts, and where appropriate with citation to the trial record. Also pursuant to Rule 15, Respondents point out Petitioner's misstatements of fact and law which have a bearing on Petitioner's questions presented.

Approximately two weeks after the escape attempt, Lieutenant Brown investigated the attempt and twice Jerkins indicated that persons other than inmates were involved. Brown discussed Jerkins' statement with ACDC Assistant Director Allison and the matter was immediately referred to the State Attorney's Office. (Petitioner's Appendix at 4a) John Tileston, an investigator for the State Attorney's Office, was assigned to investigate the matter and interviewed Jerkins outside of Brown's presence. Brown told Tileston that Jerkins had said that a "professional person" had assisted in the April attempt. Brown did not give Tileston a copy of the report of his investigation. (Petitioner's Appendix at 5a)

Tileston was familiar with Jerkins as a well-known "snitch," and testified that Jerkins was a "known credible police source" and that he had verified that Jerkins had provided reliable information in the past. In his interview with Tileston, Jerkins implicated Bailey as a corrections officer who had helped obtain hacksaw blades for the April 1987 escape attempt. (Petitioner's Appendix at 5a-6a)

As a result of Tileston's discussion with Jerkins, the investigation of Bailey proceeded. Tileston determined to test whether Bailey would accept money from Jerkins and devised a plan for this purpose. The plan was devised by Tileston and was completely out of the hands of the Respondents. Tileston, with the approval of the assistant state attorney, proceeded with the pre-arrest operation. On May 13, 1987, Tileston arranged with Captain Roundtree of the Alachua County Sheriff's Department, for a recorder to be placed on Jerkins and arranged for Jerkins

to be given $500 to offer to Bailey to carry out the test. (Petitioner's Appendix at 6a)

The role of ACDC corrections officer Brown was confined to providing the State Attorney's Office with access to areas of the jail necessary for Tileston's investigation. (R28-562-165 to 167,240) (R31-565-23) (R33-566-13,14) (R38-575-22,23,26) Chief of Security Garrahan was periodically kept informed, but did not participate in any aspect of the investigation or arrest. (R31-565-21 to 23,37,38) (R33-566-13,14) (R38-575-23) The decision was made to keep the investigation quiet and limited to a certain number of people. (Petitioner's Appendix at 29a, n.8) (R31-565-38) Lieutenant Strauss was asked to help only the night before the arrest. (R33-566-15,16) (R35-567-41 to 44) (R38-575-30,31) Merely because of their jobs as ACDC lieutenants with access to both inmates and facilities, Brown and Strauss were made available to the State Attorney's Office to facilitate specific aspects of the pre-arrest operation against Bailey. (R33-566-13 to 26) (R35-567-41 to 44) (R38-575-22,23,30,31) Tileston needed help in setting up his plan and ACDC provided him with that help.

Garrahan and Strauss were not even present when Bailey was arrested, and Brown witnessed the arrest only because he was providing access to the facilities to Tileston. (R31-565-23) (R33-566-13) (R35-567-44,45,55) Garrahan did not arrive at ACDC until the morning of May 14 after the arrest. (R31-565-23) Lt. Strauss did not know about Tileston's plan until May 13, the evening before Bailey's arrest, and even then he did not recall being told that Bailey was the subject of Tileston's operation. (R33-566-16) (R35-567-41 to 45,55,56,58,108,109)

Strauss first met Tileston only on the evening of May 13, 1987, when Tileston was orchestrating the pre-arrest operation against Bailey. (R35-567-55 to 58) (R38-575-30,31)

On the afternoon of May 13th, although not instructed to do so, Jerkins called Bailey asking him to take something out of the jail for him. Bailey testified that he mentioned something to Strauss in passing as Strauss was leaving his shift around 11:00 P.M. on May 13th to go home, but in vague terms without reference to Jerkins and Strauss did not pay much attention to it. (Petitioner's Appendix at 28a-29a) Whether Strauss told Bailey to "get physical evidence" is and always has been disputed. (R35-567-45) In fact, Strauss, who was not on duty the night of these events, had ceased being Bailey's shift lieutenant in March 1987, so that Strauss was no longer Bailey's superior. (R35-567-35,41) Despite Bailey's purported concern, he did *not* tell his superior, Corporal Sullivan, who *was* on duty that night. (R24-572-211) (R35-567-8 to 12) (R25-573-65,66)

Later that night, at around 12:45 A.M. (May 14), while on duty, Bailey discussed with corrections officer Phillips his contacts with Jerkins and Jerkins' afternoon phone call. (Petitioner's Appendix at 29a) Phillips advised Bailey to tell the sergeant on duty, but Bailey did not do so. Even though Bailey's passing conversation with Strauss had taken place shortly before, Bailey did not tell Phillips that Strauss had told him to get physical evidence, a statement which Strauss denies making. (Plaintiff's Ex. 46) In addition, Bailey conducted continuous rounds and head counts with Corporals Sullivan and Lampkin and engaged in conversation with them the

entire night of May 13th and did not mention his conversations with either Jerkins or Strauss to those superiors. (R24-572-209 to 211) (R35-567-8 to 14,18 to 20,114 to 118) (R36-568-37 to 39) (R38-575-52,53)

There was a general lack of communication among the ACDC personnel and none of Bailey's discussions with Strauss or others was reported to Tileston. The lack of communication was exacerbated by the undercover internal nature of the investigation. (Petitioner's Appendix at 29a) At 1:00 A.M. on the morning of May 14, 1987, Jerkins approached Bailey to tell him that Jerkins had money for him. Later that morning, Bailey accepted the $500 from Jerkins and went about his business feeding the inmates. During the period between the moment when Jerkins handed Bailey the money, through the time when Bailey was approached by Tileston, Cole and Brown, and during the period when he was being escorted to the office, Bailey did not mention that he had been given money by an inmate. When Tileston arrested Bailey, Bailey did not tell Tileston that he had mentioned the inmate contact to Strauss the night before. It was not until he was asked for the money, after he was arrested by Tileston, that Bailey turned over the money, commenting that they would find no fingerprints on it. (Petitioner's Appendix at 8a-11a)

Upon Bailey's arrest he was afforded a hearing in state court. Criminal charges remained pending against him until November 1987. At that time an investigation into Bailey's fitness to remain a corrections officer was pending with the Florida Department of Law Enforcement (FDLE). At the conclusion of the FDLE investigation in June 1988, ACDC reinstated Bailey with back pay.

(R34-481-21 to 23)[2] However, upon the advice of his doctor, Bailey did not return to work. (Plaintiff's Ex. 52) Upon the advice of his attorney, he did not cash the checks. (R32-480-29 to 32; Defendants' Exs. 4 and 5)

Contrary to the repeated assertions of Petitioner that Caldwell and Hayes approved Tileston's plan (Petition at 10, 15) and the letters written to Bailey (Petition at 15, 16), Caldwell and Hayes were not apprised of the circumstances surrounding Bailey's situation. For example, the first time Hayes saw Bailey's November 19, 1987 letter was at her deposition in January 1989. (R32-480-103 to 105) Both Caldwell and Hayes were copied on the December 7, 1987 letter, but neither were consulted about its contents. The letter said nothing about "suspension," but merely referred to "leave without pay." (R32-480-32 to 34) (R34-481-17) (P. Ex. 11F)

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioner's factual and legal misstatements alone warrant denial of his Petition for a Writ of Certiorari, because such misstatements render it impossible for this Court to even consider the questions presented. Moreover, the Eleventh Circuit Court of Appeals correctly decided each of the issues presented by Petitioner in accordance with both Eleventh Circuit and Supreme Court precedent. In addition, Petitioner raises no conflict

[2] Throughout the Petition, Bailey asserts, without supporting evidence, that he received no back pay. This is simply untrue.

among the Circuit Courts of Appeals, no conflict with decisions of this Court and no important question of federal law. The Eleventh Circuit's decision in this case regarding probable cause, governmental liability, pre-deprivation procedural due process and seating a biased juror are all soundly rooted in established law. Finally, certiorari should be denied because Petitioner has failed "to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding" of the questions presented, as required by Supreme Court Rule 14.5.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals correctly affirmed the District Court's directed verdict dismissing all arrest-related claims because there existed probable cause to arrest Bailey.

Petitioner's framing of this question is entirely dependent upon his misstatement of fact that the Respondents "knew Bailey to be innocent." (Petition at 20, 23, 24) This misstatement is not supported by the evidence. In fact, the majority of the evidence reveals that the Respondents did *not* know about Bailey's activities, his relationship with Jerkins, or his frame of mind. Nor is there evidence that any of the Respondents had concluded that Bailey was guilty or innocent with respect to any aspect of the situation confronted by Tileston, the arresting officer.

Petitioner also misrepresents the conclusion of the courts below by stating that he was subject to a "false

arrest." (Petition at 20, 23) The District Court and then the Eleventh Circuit concluded that Tileston had probable cause to arrest Bailey. (Petitioner's Appendix at 25a) Even though Petitioner is not challenging in this Petition the conclusion that probable cause to arrest existed, he bases his first question on the premise that Tileston did not have probable cause – an assumption that is unsupported by the facts found in the District Court and unsupported by the Eleventh Circuit's opinion.

As succinctly stated by the Eleventh Circuit: "The flaw in Bailey's efforts to undermine Tileston's probable cause is that Bailey's version of the facts failed to create a substantial conflict in what Tileston knew at the time of the arrest. . . . Although the lack of communication among ACDC personnel is unfortunate, none of Bailey's prior discussions was reported to Tileston." (Petitioner's Appendix at 27a, 28a) For example, Bailey makes much of Brown's failure to tell Tileston about Brown's report on the April 1987 escape attempt. (Petition at 21) The Eleventh Circuit specifically addresses this issue and disposes of it: "Bailey, however, overstates the significance of this omission. . . . The report would not have definitively established the source of the hacksaw blades used in that escape attempt, nor would it have ruled out the possibility that another escape attempt (involving Bailey) was being formulated." (Petitioner's Appendix at 30a)

Even if Petitioner's misstatements of fact do not foreclose consideration of this question, the Eleventh Circuit's statement of the law is settled and undisputed. The Eleventh Circuit correctly explained the law supporting its conclusion that once probable cause for arrest is found, no Section 1983 liability can attach. In spite of

Petitioner's statement that the Eleventh Circuit applied an "unexplained rule of law" (Petition at 23), this Court explained in *Pierson v. Ray*, 386 U.S. 547 (1967), that this doctrine stems from tort law standards as this Court has applied them to Section 1983 claims. In discussing *Pierson v. Ray*, the Fifth Circuit explained that probable cause is a defense to a claim of false arrest under Section 1983 "not because of any language in Section 1983, but because Section 1983 must be read in a manner consistent with the background of tort liability." *Whirl v. Kern*, 407 F.2d 781, 788 (5th Cir. 1969) *quoted in Rodriguez v. Jones*, 473 F.2d 599, 604-605 (5th Cir. 1973).

The most recent pronouncement of this settled principle in the Eleventh Circuit, *Marx v. Gumbinner*, 905 F.2d 1503 (11th Cir. 1990), was correctly cited by the Eleventh Circuit in this case. *Marx* and the principle it stands for could not be clearer and is fully supported by Supreme Court precedent. There is no split among the Circuits and Petitioner provides no legal argument for ignoring established precedent.

By virtue of the Petitioner's convoluted argument regarding alleged knowledge of Respondents who were not arresting officers, he is attempting to resuscitate his oft-rejected conspiracy claim. This claim was rejected by both courts below, and is not even presented in this Petition. Both courts found a complete lack of evidence of a conspiracy. (Petitioner's Appendix at 32a-34a)[3]

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[3] Petitioner makes reference to possible discoveries that Tileston could have made after he arrested Bailey. (Petition at

(Continued on following page)

Contrary to Petitioner's impassioned viewpoint, failure to communicate is not, and cannot be, the basis for a Section 1983 claim.

II. The Court of Appeals followed this Court's holding in *City of St. Louis v. Praprotnik* and correctly affirmed the District Court's final judgment dismissing all claims against Alachua County because there was no evidence of an official policy or custom which could result in any deprivation of Bailey's rights.

The factual and legal misrepresentations committed by Petitioner in this argument are designed to obfuscate the obvious conclusion to be drawn from reading the Eleventh Circuit's opinion together with this Court's opinion in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) – that the County Commission was the final policy-making authority for the County personnel policy and that policy is not responsible for any constitutional deprivations claimed by Bailey.

The fundamental premise upon which Petitioner bases his argument regarding governmental liability is on

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23, 25) However, the law is also clearly settled that the existence of probable cause is to be judged at the time of the arrest. Subsequent events or proceedings have no bearing on the existence of probable cause for purposes of determining Section 1983 liability. "Once probable cause has been established, the legality of the arrest is not affected by collateral bad faith of the arresting officer or a subsequent dismissal or acquittal of the charges." *Howell v. Tanner*, 650 F.2d 610, 615 (5th Cir. Unit B 1981). *See also Hunter v. Clardy*, 558 F.2d 290, 292 (5th Cir. 1977).

the assumption that his constitutional rights were violated by the wrongful acts of Respondents. Petitioner goes so far as to state that "[n]o one can dispute that Bailey was repeatedly deprived of his constitutional rights by wrongful, purposeful acts of Caldwell, Hayes and Allison and that those unconstitutional acts caused him extreme and permanent injury." (Petition at 38) Respondents *do* dispute this assumption and the Eleventh Circuit certainly does not agree with this statement.[4]

Petitioner deliberately misstates the standard for determining qualified immunity of public officials in a clear attempt to bolster his argument that the defense of qualified immunity conflicts with the law of governmental liability (as enunciated by this Court in *Monell v. New York City Dept. Soc. Serv.*, 436 U.S. 658 (1978) and *City of St. Louis v. Praprotnik, supra*). Petitioner states that "Allison, Caldwell and Hayes claim (or will claim) qualified immunity on the ground that County's personnel rules were not comprehensive and clear. . . ." (Petition at 29) This statement is irrelevant to the inquiry required to determine whether a public official is qualifiedly immune from Section 1983 liability.[5] The protection of public

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[4] Another basic factual misstatement related to this question is Petitioner's repeated and incorrect statement that he was never paid. To the contrary, he received back pay and chose not to cash the checks. (R32-480-29 to 32; Defendants' Exs. 4 and 5)

[5] As fully discussed in the Petition of Respondents Allison, Caldwell and Hayes, No. 91-2077, and as enunciated by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), to determine

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officials from personal liability is completely separate and distinct from the issue of governmental liability. The two issues are not, and should not be, linked.

The unstated aim of Petitioner's second question is to convince the Court that the County should be adjudged liable on a theory of *respondeat superior*. However, this concept has clearly been rejected by this Court and by Congress. *Monell*, 436 U.S. at 691-694. In order to hold a local government liable, an official policy or custom of the government itself must be responsible for inflicting the injury. *Id*. This Court expanded further on the standard for governmental liability in *Praprotnik* and the Eleventh Circuit in this case followed that precedent without deviation.

As in *Praprotnik*, in this case there is no evidence indicating that the County Commission delegated to anyone its final authority in respect of the personnel policy set by the Commission. 485 U.S. at 128. The Eleventh Circuit correctly applied *Praprotnik* in holding that the final policy-making authority in this case rested with the County Commission. (Petitioner's Appendix at 48a)

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qualified immunity the court must inquire whether a reasonable public official, in light of the clearly established law and the information possessed by that official, could have believed that the action taken was unlawful. *Anderson*, 483 U.S. at 641. Petitioner also misstates the Eleventh Circuit's holding with respect to Bailey's post-deprivation procedural due process claim. This issue is fully treated in the Petition of Allison, Caldwell and Hayes.

Petitioner's argument is merely a restated view that *respondeat superior* liability should apply. This Court has clearly addressed the issue of local governmental liability. As this Court stated in *Praprotnik*: "Except perhaps as a step towards overruling *Monell* and adopting the doctrine of *respondeat superior*, ad hoc searches for officials possessing such *"de facto"* authority would serve primarily to foster needless unpredictability in the application of Section 1983." 485 U.S. at 131.

This Court has fully explicated the standard for assessing local governmental liability. This case raises no new issues in that regard and certainly requires no change in the law, nor does it require this Court to fine-tune its prior decisions.

III. The Court of Appeals correctly affirmed the District Court's orders granting Ailison, Caldwell, Hayes and Alachua County summary judgment with respect to Bailey's pre-deprivation procedural due process claims.

In this argument, Petitioner challenges the Eleventh Circuit's affirmance of the granting of qualified immunity to Respondents with respect to Bailey's pre-deprivation procedural due process claim. However, Petitioner once again misstates the legal analysis for qualified immunity. In the text of this third question, Petitioner misrepresents the standard as immunity from liability "merely because the exact factual situation had not been confronted before." (Petition at 39) The correct analysis is discussed by Respondents in Section II of this Opposition and is

analyzed in detail in their Petition for Writ of Certiorari (No. 91-2077).[6]

As with the other questions presented in this Petition, Bailey's misstatement of key facts make consideration of the issue raised virtually impossible. He incorrectly asserts, with no supporting evidence, that Caldwell and Hayes approved the suspension letter and that Bailey received no pay. (Petition at 40) Moreover, as in the argument Petitioner makes in connection with his first question presented, once again he is using this question as a pretext for interjecting his failed conspiracy theory. Petitioner states, in direct contradiction to the evidence and the rulings of both courts below, that "this action was prearranged by these Defendants in connection with the plan to set a trap to arrest Bailey." (Petition at 40) Even though Petitioner is not requesting review of the Eleventh Circuit's affirmance of the District Court's rejection of his conspiracy claim, he continues to raise it under the guise of other issues – none of which warrant review.

Petitioner makes these false statements and promotes these misapprehensions to lend credence to his argument that *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), requires notice and a hearing before suspension

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[6] To the extent that there are issues for review in this case with respect to qualified immunity, they are as presented in the Petition of Respondents Hayes, Caldwell and Allison. If review of those issues is granted, this Court will be in a position to resolve the only issues left unresolved by the Eleventh Circuit and will also resolve the split among the Circuits regarding whether the issue of qualified immunity may be submitted to the jury.

from public employment under all circumstances. (*Loudermill* held that a delay of nine months in providing a post-deprivation hearing was not constitutionally infirm.) However, the Eleventh Circuit did not depart from the principles adopted by this Court that it had "rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property." (Petitioner's Appendix at 41a quoting *Parratt v. Taylor*, 451 U.S. 527, 540 (1981))

In this case, the Eleventh Circuit correctly pointed to the "flexibility in the constitutional requirements pertaining to a pre-deprivation hearing." (Petitioner's Appendix at 41a, n.12) The Court then applied that flexible legal standard in this case: "A corrections facility's paramount concern is security; a guard suspected of corruption compromises that security. Therefore, the defendants could have reasonably believed that this was a situation with a 'necessity for quick action' that made a pre-deprivation hearing impracticable." (Petitioner's Appendix at 42a)[7]

Petitioner raises no issue worthy of this Court's consideration in connection with pre-deprivation due process. There is no split among the Circuits and, contrary to

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[7] With respect to the suspension with pay alternative proposed by the Petitioner, as pointed out by the Eleventh Circuit, the existence of one sentence expressed in *Loudermill* in passing was not sufficient for Bailey to carry his burden of showing that suspension with pay under these circumstances was required by clearly established law. (Petitioner's Appendix at 43a, n.13)

Petitioner's contention, there has been no deviation from this Court's precedents.

IV. The Court of Appeals correctly found no fair support in the record for the District Court's conclusion that a juror would be impartial even though doubts of bias existed.

Through overstatement, misstatement and selective omission, Petitioner mischaracterizes the evidence of bias of juror Johns. The Eleventh Circuit examined the full transcript of the juror's voir dire and correctly concluded that there was no fair support in the record for the District Court's conclusion that she could or would be impartial. *See Patton v. Yount*, 467 U.S. 1025, 1038 (1984). Contrary to Petitioner's unsupported assertion that the standard of review should involve some form of "customary deference," the *Patton* standard, correctly applied by the Eleventh Circuit in this case, subsumes that concept. If there were "fair support in the record," deference would be appropriate. However, that is not the case here.

The Eleventh Circuit pointed out that "Johns testified that she knew many of the potential witnesses through her employment." (Petitioner's Appendix at 62a, citing to the trial record) The Eleventh Circuit also stated: "The record in this case leaves juror Johns' impartiality in question." (Petitioner's Appendix at 63a) Petitioner fails to mention that the District Court judge interrupted Johns at a crucial moment in her voir dire testimony. (Petitioner's Appendix at 63a) In fact, even the portions cited in the Petition itself show that "Johns' responses to

whether her connections to Bailey would make any difference to her ability to serve as an impartial juror were hesitant and equivocal." (Petitioner's Appendix at 64a and Johns' testimony reproduced at 64a, n.21)

Furthermore, Petitioner presents a garbled argument claiming that the standard applied by the Eleventh Circuit "derogates from the unfettered right of litigants such as Bailey to exercise peremptory challenges without being manipulated unfairly." (Petition at 47) Petitioner provides no support for this complaint. The argument behind this assertion is practically impossible to discern. Of the four questions presented in this Petition, this question most notably fails to accurately and clearly present "whatever is essential to a ready and adequate understanding" of the question, as required by Supreme Court Rule 14.5. This question fails utterly to express a reason for granting review.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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